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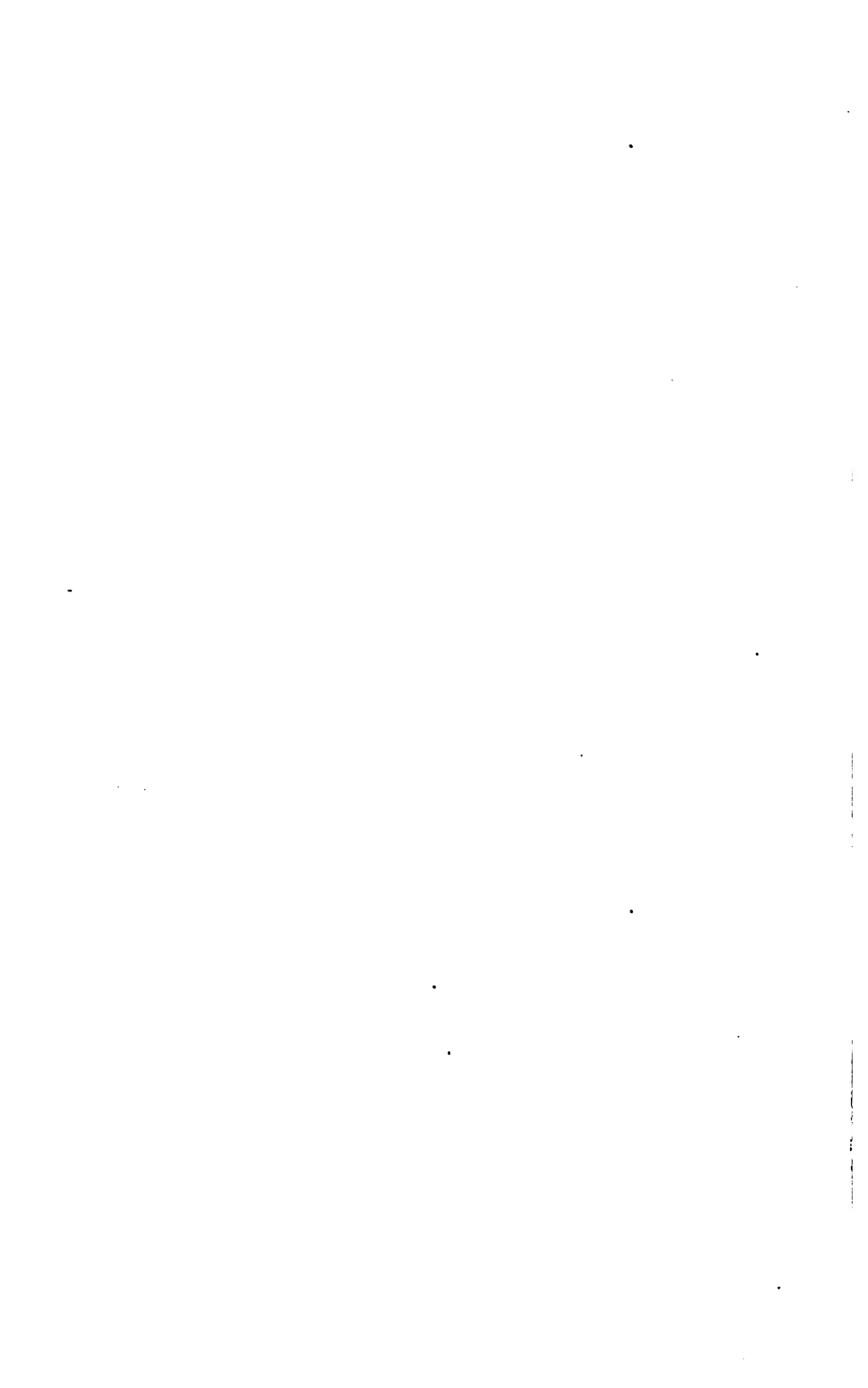
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WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WASHINGTON

AUGUST 30, 1916—DECEMBER 26, 1916

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JUDGES
OF THE
SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED IN THIS VOLUME

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*Appointed November 17, 1916, to succeed E. K. Pendergast, deceased.

†Appointed November 16, 1916, to succeed J. Stanley Webster, resigned.

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ERRATA

Page 314, 2d syllabus, line 2, for unconditional read conditional

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 13494. Department Two. August 30, 1916.]

JAMES S. GRANT *et al.*, *Appellants*, v. MONTEREY GOLD
MINING COMPANY *et al.*, *Respondents*.¹

CORPORATIONS—DISSOLUTION ON INSOLVENCY—DISPOSITION OF ASSETS. Rem. 1915 Code, § 3715a, providing that a corporation whose name had been stricken for nonpayment of its license fees may hold a meeting of its stockholders and pass such resolutions as may be necessary to close out its affairs and wind up its business, modifies the former act, Rem. 1915 Code, § 3715d, providing that such a corporation is dissolved and the directors shall hold the property for the benefit of stockholders and creditors; and the stockholders may meet and dispose of all assets by a sale to another company assuming the indebtedness, in consideration of an exchange of its shares, and are not limited to the statutory procedure for a dissolution.

SAME—DISSOLUTION ON INSOLVENCY—SALE OF ASSETS—EXCHANGE OF STOCK—MINORITY STOCKHOLDERS—ASSENT. Minority stockholders of an insolvent corporation who assented or agreed to the acceptance of an exchange of stock in another corporation purchasing all the assets and assuming all the debts, cannot, two years later, be heard to object that the insolvent corporation had no power to wind up its affairs by such sale.

Appeal from a judgment of the superior court for Spokane county, Jackson, J., entered November 4, 1914, in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

O. C. Moore, for appellants.

Burcham & Blair, for respondents.

¹Reported in 159 Pac. 895.

BAUSMAN, J.—The Monterey Company, having a capital of one million paid and non-assessable shares, owned certain mines mortgaged for advances from some of its directors. The security being overdue in March, 1911, the company much in other debts, and a foreclosure being threatened, the shareholders were called to meet in April.

The call proposed final action upon the company's affairs, and the shareholders resolved to accept the proposal of a new company, the Bolster Mining Company, organized by some of the Monterey shareholders, to buy the Monterey Company's mines, assuming the latter's indebtedness and exchanging its own shares on a certain basis with the retiring shares of Monterey. The Bolster stock, however, was to be assessable to the extent of a twentieth. The Monterey Company conveyed to the Bolster Company as early as August of 1911, and has no remaining assets.

Before all this, the company's license fees had been delinquent more than two years; so, under Rem. 1915 Code, § 3715d, its name had been stricken by the secretary of state. According to that section, the directors must thereafter hold the property of the delinquent company "for the benefit of its stockholders and creditors to be disposed of under appropriate court proceedings." That was an enactment of 1909 which however, must be read today with one of 1911, page 135, § 1 (the present Rem. 1915 Code, § 3715a, providing that, though the corporation be thus stricken and dissolved, it may

"at any time thereafter hold a meeting of stockholders, in the same manner as provided during its corporate existence, and pass such resolutions as may be necessary to close out its affairs and wind up the business of such corporation, and where such stricken and dissolved corporation has heretofore held such meetings of stockholders for the purpose of passing resolutions to wind up their affairs, such method of procedure is hereby validated and approved."

A meeting being clearly authorized by this law, the only contention left is whether the statute restricts it to proceed-

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ings for a drastic sale of assets or whether the meeting may close the company's affairs in some other way also. The latter option we unhesitatingly pronounce. This statute has frequently been interpreted as a revenue measure. *State ex rel. Preston Mill Co. v. Howell*, 67 Wash. 377, 121 Pac. 861, and the delinquent is presumably penalized under it by the expense and inconvenience of new organization.

The complaining minority shareholders, accordingly, can allege here no violation of the statute, but must maintain their case for a receivership and a restoration of the Monterey Company's assets on some violation of general corporation law.

The majority plan of reorganization through a new company was apparently based on *Pitcher v. Lone Pine-Surprise Consol. Mining Co.*, 39 Wash. 608, 81 Pac. 1047, but it is unnecessary to say whether that plan shall be again approved by this court, because there is here decisive acquiescence. That a minority shareholder cannot be compelled, even in corporate distress, to accept shares in a new company may be conceded (*Mason v. Pewabic Mining Co.*, 133 U. S. 50), but he has a right to agree to do so, and this record is convincing that all the plaintiffs did agree, some by assent and others by actual exchange. The latter are manifestly silenced, while as to the former, they will not be heard to object now, for though the Monterey Company conveyed in August, 1911, this suit was not begun until March, 1913, not indeed until proceedings by the Bolster Company to sell some of the exchanged shares for unpaid assessments.

We are obliged to consider such delay fatal to all these plaintiffs, who, it may be added, did not bring their suit in behalf of all other shareholders that might join and contribute to the expense, but only for themselves.

Judgment affirmed.

MORRIS, C. J., MAIN, FULLERTON, and PARKER, JJ., concur.

[No. 13632. Department One. September 5, 1916.]

THE STATE OF WASHINGTON, *on the Relation of J. E. Willis,*
Plaintiff, v. D. W. MONFORT, as Auditor of Lewis
*County, Respondent.*¹

JUDGES — ELIGIBILITY — SUSPENSION — CONSTITUTIONAL PROVISIONS. Under the rule that the reason and intention of the lawgiver controls the strict letter of the law when the latter would lead to palpable contradiction and absurdity, an attorney who is suspended from practice at the time he becomes a candidate or is required to qualify is not eligible to the office of superior court judge, under Const., art. 4, § 17, which provides that no person shall be eligible to such office "unless he shall have been admitted to practice" in the courts of record; since the constitution defines a personal status which must continue and the eligibility ceases when the status ceases, and any other construction would lead to absurdity.

Appeal from an order of the superior court for Lewis county, D. F. Wright, J., entered August 11, 1916, dismissing an application for a writ of mandamus to compel the placing of relator's name upon the ballot as a candidate for the nomination of superior judge. Affirmed.

J. E. Willis, in propria persona.

Forney & Ponder and C. D. Cunningham, for respondent.

MOUNT, J.—This is an appeal from an order of the lower court dismissing the petition of the relator for a writ of mandamus to compel the auditor of Lewis county to print the name of the relator upon the ballot as a candidate for the nomination of superior judge. It appears from the petition, that the relator is a citizen of the United States and of this state and a qualified voter in Lewis county; that he is, and was at all times stated in the application, duly admitted to practice law in the courts of record of this state; that, in the month of July, he filed his declaration of candidacy and tendered to the auditor the fees provided by law therefor, but after the filing of such declaration, the

¹Reported in 159 Pac. 889.

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Opinion Per MOUNT, J.

county auditor notified relator that he would not print relator's name upon the ballot to be used at the primary election in September. The petition also shows that, on the 14th day of July, 1916, after a trial in an action wherein the state of Washington upon the relation of the Lewis County Bar Association was petitioner and the relator was the respondent, a judgment was entered in that case suspending the relator from the practice of law in this state for a period of one year from the date of that decree. On these facts, the lower court was of the opinion that the relator was not eligible to be a candidate for the office of judge of the superior court, and for that reason sustained the demurrer.

This involves the construction of § 17 of art. 4 of the constitution, which reads:

"Sec. 17. Eligibility of Judges. No person shall be eligible to the office of judge of the supreme court or judge of a superior court unless he shall have been admitted to practice in the courts of record of this state or of the territory of Washington."

It is insisted by the appellant that this section of the constitution should be given a strict construction, as was done in the case of *State ex rel. Reynolds v. Howell*, 70 Wash. 467, 126 Pac. 954, 41 L. R. A. (N. S.) 1119. It is no doubt correct to say that a constitutional provision should be given a strict construction, especially where its terms are clear; but the rule is that the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction and absurdity. 1 Kent, Commentaries, 462; *Heydenfeldt v. Daney Gold & Silver Min. Co.*, 93 U. S. 634.

It is argued by the appellant that, because the constitutional provision uses the words, "No person shall be eligible to the office of . . . judge of a superior court unless he *shall have been* admitted to practice in the courts of record of this state," it means that every person who has heretofore

been admitted to practice law in the courts of record of this state is eligible to the office of judge of the superior court, no matter what may occur thereafter. We think it would be absurd to say that this provision of the constitution means that, when a person has been admitted to practice in the courts of record of this state and subsequently he has been disbarred for cause or his admission vacated, he is still eligible to the office of superior judge by reason of his original status. The construction of this constitutional provision contended for by the appellant leads to that absurdity. When the constitution was framed and when it was adopted, it was clearly not the intention of the people in adopting it to authorize a person to be elected judge who was not, at the time of his election, entitled to practice as an attorney in the courts of record in the state. This provision of the constitution, in our opinion, defines a personal status which must continue, and when the status ceases to continue the person is ineligible. We think no other reasonable construction can be placed upon this provision.

No authorities directly in point have been called to our attention. The case of *Brown v. Woods*, 2 Okl. 601, comes nearer to the point than any other to which we have been referred. That was a case where there was a statute providing "that no person shall be eligible to the office of county attorney who is not duly admitted to practice as an attorney in some court of record in this territory." A disbarment proceeding had been instituted against the petitioner, Woods, in that case and he was suspended from practice. Before the trial was had he was elected county attorney, and the court in that case, in passing upon his eligibility to hold the office, said:

"The evident purpose and intention of the legislative act, with reference to eligibility of a person to the office of county attorney, was not only that he should possess qualifications to perform the duties of the office of county attorney, but that there should be a judgment and determination of a court

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that he does possess the moral and mental qualifications of an attorney; that there should be a determination of a court that he was a person of good moral character, and learned and skilled in the legal profession. It requires that he 'shall have been duly admitted to practice' and then specifies the particular duties that he is required to perform. The statute, it is true, does not say in terms that he must not have been disbarred from practice in the very court in which the law requires him to perform certain professional duties, but the terms of the act show that this was within the reason and intention of the legislature. It was within the purpose and spirit of the act, and that which is within the reason, purpose and intention of the language used is as much within the act as though it were a part of the language itself."

That reasoning is applicable to this case. We think it is clear that the constitution meant to say that no person is eligible to the office of judge of the superior court unless he shall have been admitted to practice in the courts of record in this state, which means that he not only shall have been but that he is, at the time he becomes a candidate or is required to qualify as such judge, entitled to practice in the courts of this state. The fact that the petitioner is suspended rather than disbarred for all time is of no special importance, because, under his suspension, he is disbarred during that time from practice in the courts and from being eligible to any office or employment by reason of the fact that he had at one time been admitted to practice. When he was suspended from exercising the rights of an attorney at law, that suspension was as effective during the time thereof as a removal.

In view of the conceded fact that the relator is suspended, it follows that he is not eligible to hold office at the time he is required to qualify, and that he is not eligible to become a candidate upon the ticket. *State ex rel. Reynolds v. Howell, supra*. The respondent was therefore justified in refusing to print his name upon the ballot.

The judgment appealed from is affirmed.

MORRIS, C. J., MAIN, ELLIS, and FULLERTON, JJ., concur.

[No. 13074. Department One. September 8, 1916.]

**C. R. JENSEN, *Trustee etc., Respondent*, v. INESON J. KOHLER
*et al., Appellants.*¹**

APPEAL—REVIEW—PLEADINGS—AMENDMENTS. Where defendants answered and proceeded to trial on the merits, defects in the complaint will, on appeal, be deemed cured by the evidence.

CORPORATIONS—WINDING UP—STIPULATION—RIGHTS OF TRUSTEE. Where the stockholders of a corporation stipulated that all the assets be turned over to a trustee for administration, one who retains any of the assets and divides them among the stockholders is liable to the trustee.

PLEADING—ISSUES—STRIKING CAUSE OF ACTION—EFFECT. Where one of two causes of action was struck out in response to defendants' demurrer for misjoinder, the defendants cannot insist upon litigating the eliminated issue under an affirmative defense where the plaintiff did not seek to try, and the complaint as corrected did not tender, the issue.

CORPORATIONS—WINDING UP—TRUSTEE'S ACTION—ISSUES—DEFENSES. An action by a trustee of a corporation to recover a collection, made by an attorney and divided among stockholders, does not involve the trustee's conduct in administering the trust, which can only be litigated in an action against the trustee for an accounting.

APPEAL—REVIEW—FINDINGS—STIPULATION. Upon a conflict of the evidence and in the absence of findings, the supreme court will not find that a stipulation was made in open court, when it was not reduced to writing as required by superior court Rule X.

ATTORNEY AND CLIENT—LIEN—WAIVER. An attorney waives his attorney's lien on a claim which he held for collection for a corporation, by failing to reserve the lien in a stipulation which he signed as a stockholder agreeing to turn over all assets to a trustee for administration.

SAME—EXCESSIVE CHARGES—STATUTES—SUMMARY REMEDY. The summary method provided by Rem. 1915 Code, §§ 137, 138, for the adjustment of excessive attorney's charges is not exclusive, and a trustee of a corporation appointed by stipulation may maintain an action to enforce the agreement against the parties, including an attorney withholding an excessive fee.

PLEADING—AMENDMENT—AT TRIAL—ABUSE OF DISCRETION. In an action by a trustee of a corporation to recover a balance of a collec-

¹Reported in 159 Pac. 978.

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tion wrongfully divided among the stockholders, in which one of the defendants claimed an attorney's fee for making the collection, it is an abuse of discretion to refuse leave to make a trial amendment to his answer setting up the reasonable value of the services, where plaintiff knew from the beginning that he claimed such a fee in addition to his retainer, in view of the liberal rule imposed by Rem. 1915 Code, § 303, as to amendments.

Appeal from a judgment of the superior court for King county, Smith, J., entered May 18, 1915, upon findings in favor of the plaintiff, in an action to enforce a trust agreement, tried to the court. Modified.

Milo A. Root, for appellants.

Alfred Gfeller, for respondent.

ELLIS, J.—Plaintiff, as trustee of the Rodgers & Kohler Company, a corporation, brought this action to recover a balance of a collection made by defendant, Isaac J. Kohler, as attorney, claimed as an asset of the corporation, and to enforce the surrender of the stock of defendants in the corporation preparatory to a final settlement of the trusteeship, which arose as follows:

Charles W. Rodgers and wife and defendants, Isaac J. Kohler and his son, Ineson J. Kohler, and wife, owned all the stock of the corporation. In the summer of 1911, irreconcilable differences having arisen between the Rodgers and Kohler interests, Rodgers brought a suit in the superior court of King county for the appointment of a receiver to wind up the affairs of the corporation. A receiver was appointed, but before he had qualified, all the parties and their attorneys signed a stipulation that all of the books and assets of the corporation be transferred and assigned to C. R. Jensen, as trustee, to divide among the parties the physical assets as specified in the stipulation, collect all accounts not assigned to Rodgers in satisfaction of a claim of \$1,479.72 held by him against the corporation, and divide the proceeds among the parties share and share alike, all stock certificates

to be delivered to the trustee for cancellation, the trustee to receive for his services \$25 a week to be paid from the assets.

On August 16, 1911, pursuant to this stipulation, the Rodgers & Kohler Company, by its president and secretary, executed to C. R. Jensen, plaintiff herein, a transfer in the nature of an assignment in trust, conveying all the right, title and interest of the corporation "to all stock in trade, goods, merchandise, machinery, tools, books, leasehold premises and effects; also all its right, title and interest in and to all debts and sums of money now due and owing to said corporation, whether the same be by bond, bill, note or account or otherwise," to be held for the benefit of the stockholders and disposed of according to the above mentioned stipulation. Jensen accepted the trust and the receivership action brought by Rodgers was dismissed. Jensen at once proceeded to collect the accounts, and had distributed the proceeds and other assets pursuant to the stipulation, except the proceeds of the Rounds & Company claim hereinafter mentioned.

In November, 1911, the Kohlers began an action against the trustee and Rodgers to restrain the trustee from further action and for an accounting. Defendants in that action demurred to the complaint, and the matter so stood until in January, 1913, when the Kohlers, through their attorney, dismissed that action without prejudice.

Prior to the transfer of the assets to the trustee, the corporation had placed in the hands of Kohler, Sr., who is an attorney, a claim of \$717.38 due to it from E. J. Rounds & Company, a bankrupt concern, for collection, paying him a retainer of \$50. On taking over the assets, Jensen permitted him to retain this claim for collection. Proceeding in the Federal court in which the bankrupt matter was pending, Kohler, Sr., shortly before the dismissal of the above mentioned injunction suit, succeeded in collecting from the bankrupt and its bondsmen the face of this claim. Deducting \$200 as his fee for the collection and \$22.50 for expenses, he paid

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to himself, and to Ineson J. and Pearl Kohler, as stockholders of the Rodgers & Kohler Company, \$333.82, and sent Jensen a check for \$161.06 as Rodgers' share. Jensen demanded that the full amount of the collection be turned over to him as trustee, and demanded that the Kohlers deliver to him their certificates of corporate stock. Both demands were refused. Jensen, about a month after the dismissal of the injunction suit, cashed the check, and in July, 1913, commenced this action to collect the balance of \$556.32 from the Kohlers and to secure a surrender of their stock certificates. In this cause of action all the foregoing matters were alleged. For a second cause of action, the trustee charged that the Kohlers had instituted the injunction suit in November, 1911, maliciously and to embarrass the trustee in the performance of his duties, compelling him to incur a liability of \$150 for attorney's fees, which sum he asked as damages.

Defendants jointly demurred to the complaint on grounds, among others, that the complaint stated no cause of action and that the two alleged causes of action were improperly united. The court overruled the demurrer except as to the last mentioned ground, whereupon plaintiff asked and was granted leave to abandon and strike out the second cause of action.

Defendants jointly answered, denying that plaintiff had divided the assets, except the proceeds of the Rounds claim, in accordance with the trust agreement, denying that defendants had converted the proceeds of the Rounds claim, denying that they had refused to surrender their stock certificates, and alleging as a first affirmative defense that, at the time of the collection of the Rounds claim, the affairs of the Rodgers & Kohler Company had been wound up, that plaintiff for a long time had been employed by Rodgers and had been working in the interest of Rodgers and against the interests of the trusteeship, and that he had paid to himself from the trust funds \$250 to which he was not entitled. As a second affirmative defense, defendants alleged that, on the

dismissal of their suit for an injunction and an accounting, it was stipulated between the parties by their attorneys in that case that Rodgers and the trustee, in consideration of such dismissal, would release any and all claim to the proceeds of the Rounds claim sued for in the present action. Defendants' prayer was simply for a dismissal of the present action.

The court found the facts substantially as alleged in the complaint and concluded, as matters of law, that plaintiff, having received \$161.06 of the proceeds of the Rounds collection, was entitled to have turned over to him as trustee \$533.82, being the balance of that collection less \$22.50 costs and expenses of the collection proceedings; that \$333.82 of this sum was withheld by and should be turned over by Isaac J., Ineson J., and Pearl Kohler, and \$200 was withheld by and should be turned over by Isaac J. Kohler individually; that all of defendants should be required to surrender their certificates of stock in the corporation. Decree went accordingly. Defendants appeal.

We shall consider appellants' contentions in their logical order. It is claimed that, the action being for specific performance of the trust agreement, the complaint stated no cause of action, and particularly none against Kohler, Jr., and wife, in that there was no allegation that appellants, at the time this action was commenced, had in their possession the money claimed. Appellants, however, jointly answered and proceeded to trial on the merits. In such a case, the complaint will not be narrowly scanned for defects. *Johnson v. Johnson*, 66 Wash. 118, 119 Pac. 22. The evidence cured any insufficiency of the complaint in this particular. The statement of Kohler, Sr., transmitting to respondent the \$161.06, which is in evidence, stated that he had collected the money and indicated that he had turned over to Kohler, Jr., at least some part of it. There was no evidence that he had otherwise parted with any of the money. Appellants were all parties to the stipulation, which provided that

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all the assets of the corporation should be turned over to the trustee for administration. In the face of the stipulation, none of the appellants had any right to retain any of the assets and divide them among the stockholders. That is the office of the trustee until he has finally accounted or has been removed.

It is insisted that the court erred in refusing to allow appellants to show the length of time in which the trustee could properly have performed his services, that he did not perform those services in good faith, but was guilty of partiality and made excessive and improper charges for services. While it is true these things were charged in appellants' first affirmative defense, the issues were narrowed to the single question of the Rounds & Company collection when respondent, in response to appellants' demurrer to the complaint, struck from the complaint the second cause of action. That part of the complaint tendered the very issue which appellants sought to try. The court was of the opinion that the issues thus narrowed did not involve the conduct of the trustee in his administration of the trust, and that these were matters which could only be litigated in an action against the trustee for an accounting. In this we think the court was right. Appellants, by their own action, having forced the elimination of this matter from the complaint could not insist upon litigating it under their answer. The issues were narrowed at their own instance.

Appellants also contend that the evidence clearly sustained their second affirmative defense and showed that, on the dismissal of their suit for an injunction and an accounting against the trustee, it was the understanding between the attorneys for both parties in that action that the trustee and Rodgers would forego all claim to the money claimed by respondent in this action. The evidence as to such an understanding was in the sharpest conflict. We shall not review it in detail. There is no claim that any such stipulation was made in open court and entered upon the court's minutes or

that it was reduced to writing, as required by Rule X of the superior courts. See rules in volume 82 Washington Reports. The trial court made no findings on this subject and, so far as the record shows, none was requested. On the record before us, we are not warranted in finding that any such agreement was made.

Appellants further claim that, in any event, under Rem. 1915 Code, § 136, Kohler, Sr., was entitled to a lien on the money and stock certificates in his hands and could not be compelled to surrender either until his fees were paid. He was a party to and signed the stipulation agreeing to turn over to the trustee "all debts and sums of money now due and owing to said corporation, whether the same be by bond, bill, note or account or otherwise." If he intended to claim an attorney's lien in the Rounds' account, which was then in his hands for collection, he should have so stipulated. He had already received a retainer of \$50 when he signed that stipulation. It is not claimed that he had a contract for a greater sum or any contract lien for any sum. By failing to reserve a lien in the stipulation, he waived the right to claim such lien thereafter. *State v. Lucas*, 24 Ore. 168, 33 Pac. 538. In *Davis v. Bartz*, 65 Wash. 395, 118 Pac. 334, we sustained a similar waiver of a mechanics' lien. Having no lien by contract and having waived his right to the statutory attorney's charging lien by signing the stipulation, Kohler, Sr., had no right to retain any part of this money under a claim of lien.

But it is urged that, if the charges made for his services were claimed to be excessive, respondent should have pursued the summary method provided by Rem. 1915 Code, §§ 137, 138, to have the matter adjusted. But the statute does not declare this summary remedy exclusive. Respondent had the right to maintain an action to enforce the trust agreement against the parties to that agreement.

One question remains. At the trial appellant Kohler, Sr., sought to prove what services he performed in making the

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Rounds & Company collection and the reasonable value of such services. Respondent objected on the ground that no such issue was tendered by the answer. The objection was sustained. Appellant then asked leave to amend the answer to meet this objection. The request was denied. Whether or not a trial amendment shall be permitted is a matter resting largely in the discretion of the trial court, but in this case it is obvious that the amendment could not have resulted in prejudicial surprise. Respondent knew from the beginning that Kohler, Sr., claimed an attorney's fee for the service rendered in addition to the retainer he had already received. Under the liberal rule imposed by the statute, Rem. 1915 Code, § 303, we think the refusal to permit the amendment was an abuse of discretion. But it does not follow that the judgment should be reversed and a new trial ordered. The other issues were clearly made, fairly tried, and correctly decided.

The cause is remanded with direction to permit the amendment of the answer, take evidence as to the services performed and their reasonable value, determine the amount of the fee which should be allowed and, if this be found to exceed the sum of \$50 already paid, reduce the recovery against Isaac J. Kohler in the amount of such excess, but in no event shall such reduction exceed the sum of \$200 claimed. Neither party may recover costs in this court.

MORRIS, C. J., FULLERTON, MOUNT, and CHADWICK, JJ.,
concur.

[No. 13086. Department One. September 15, 1916.]

LOREN S. HULL, *Appellant*, v. L. M. DAVENPORT *et al.*,
Respondents.¹

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—SAFE PLACE AND METHODS—ELEVATORS—QUESTION FOR JURY. The negligence of the owner of a restaurant in failing to furnish safe appliances and adopt a system of rules in the use by waiters of an automatic freight and passenger elevator is a question for the jury, where the elevator was used every day by approximately 100 employees, there was no way for an employee on one floor to tell when another above or below was about to make simultaneous use of it, and a system of bells to give warning could have been installed at a cost of five dollars.

SAME. That there was no evidence of a general custom of employers to adopt a system of rules for warning or signal devices is a mere matter of defense to be submitted to the jury, and does not establish insufficiency of the evidence to show negligence as a matter of law.

SAME—INJURY TO SERVANT—SAFE PLACE AND METHODS—ASSUMPTION OF RISKS—QUESTION FOR JURY. Where waiters were required to use an automatic elevator having no system of signal devices or rules to give warning of simultaneous use by other employees, the employee does not assume the risks unless the danger was so obvious that no man of ordinary prudence would have obeyed the order; and the question is for the jury, where there was posted at the elevator entrance a standing order to "Use the Elevator," no means were provided for giving any sort of a signal, and the plaintiff testified that he did not appreciate or think of the danger because of absorption in his work.

SAME—INJURY TO SERVANT—FELLOW SERVANTS. The negligence of a fellow servant is not involved where, through the failure of the master to provide a safe place and safe appliances for the simultaneous use of an automatic elevator requiring a system of signals, a waiter was injured in entering the elevator when another employee started it without warning.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A waiter entering an automatic elevator is not guilty of contributory negligence as a matter of law where he used it for the purpose intended in the only manner it could be used, and before doing so looked up and could see nothing to indicate that any one was in the act of starting it.

¹Reported in 159 Pac. 1072.

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Appeal from a judgment of the superior court for Spokane county, Sessions, J., entered June 11, 1915, upon granting a nonsuit, dismissing an action for personal injuries sustained by an employee in using an elevator. Reversed.

Plummer & Lavin and Attwood A. Kirby (Mack F. Gose, of counsel), for appellant.

Danson, Williams & Danson (George D. Lantz, of counsel), for respondents.

ELLIS, J.—Action for personal injuries. Defendants own and conduct a restaurant and hotel in Spokane. Plaintiff was an experienced waiter. At the time of the accident, he was, and for a considerable time had been, in defendants' service in that capacity. His duties were those of an ordinary waiter, in addition to which he was required to keep his tables stocked with staple supplies, such as crackers, sugar and the like. These he secured from the commissary department, located in the basement immediately beneath the restaurant proper and the kitchen, which were on the first floor.

At the time of the accident and for some months prior thereto, defendants had installed a slow-moving hydraulic elevator, used indiscriminately for persons and freight, extending from the kitchen immediately adjoining the restaurant to the basement floor. All of the waiters and employees about the restaurant and storeroom, estimated by witnesses at over one hundred, were accustomed to use this elevator daily. Three sides of the elevator shaft were enclosed by iron lattice work. The other side, which faced the kitchen on the upper floor and the storeroom on the basement floor, was open but for a gate which raised and lowered automatically as the elevator was lowered and raised, so that when the elevator was at the kitchen floor the gate would be at the basement floor, and *vice versa*, barring the entrance to the elevator well on either floor when the car was at the other. The gate and the car would thus meet each other at about

half the distance between the two floors. The elevator was operated by means of a chain which extended through the floor of the elevator, by pulling which the elevator was raised or lowered as desired. There was no operator in charge of the elevator. It was operated by the waiters and other employees indiscriminately at any time their work required its use. It was impossible for a person standing in the kitchen to look down this shaft and see if any person was about to enter the elevator at the basement floor. The same difficulty was presented to a person entering the car from the basement to determine whether the elevator was about to be operated by some one on the kitchen floor. Owing to some unexplained mechanical defect, the elevator when lowered would not descend flush with the basement floor, but would stop a foot or eighteen inches above the floor level. There was no call bell or other means of signalling from the basement to the kitchen, nor from the kitchen to the basement, when the elevator was about to be used, nor was any rule or system promulgated or enforced requiring the giving of any kind of warning when a person was about to enter or leave the elevator or about to set it in motion. A call from below could not be heard in the kitchen because of the noise of a steam dishwasher. Plaintiff testified that he did not realize or appreciate the dangers of operating the elevator without signals—that he never thought of it, as his mind was fully occupied with his work.

On September 27, 1914, plaintiff went to work at about seven o'clock a. m. He procured a requisition for supplies, went through the dining room to the kitchen, entered the elevator, pulled the chain and descended to the basement floor, where the elevator, as usual, stopped at about eighteen inches above the level of the basement floor. After securing the supplies, which he carried in his arms, he returned to the elevator, which was standing as he had left it, looked up to see if any one was about to start it from above, saw nothing to advise him of danger, and stepped upon the elevator. He

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testified that, just at that time, one of the boxes in his arms slipped and his apron also caught, and just as his weight was partly on the elevator, it started up, throwing him to the floor of the elevator. The gate, as it descended, caught his right foot and dragged his leg between the gate and the elevator floor, causing a comminuted compound fracture of the femur which has resulted in a permanent shortening of the right leg of about two and one-half inches. No instructions nor warning had ever been given him as to the dangers attendant upon the customary use of the elevator. A sign was posted at the elevator in the kitchen reading: "Use the elevator." There was evidence that it was practicable to install a system of bells which would give warning either automatically or otherwise at an expense not exceeding five dollars.

The negligence charged was, (1) failure to furnish a safe place to work; (2) failure so to equip the elevator and to so maintain it that it could not be started at one floor without giving warning to persons entering or leaving it at the other; (3) failure to install any signal system or to promulgate and enforce adequate rules for the giving of warning that the elevator was about to be used. Defendant denied these allegations of negligence and set up as affirmative defenses assumption of risk, negligence of a fellow servant, and contributory negligence.

At the close of plaintiff's evidence, which tended to establish the foregoing facts, defendants interposed a challenge to its sufficiency, which was sustained, and a judgment of nonsuit was entered accordingly. Plaintiff appeals. *

The duty of the master to exercise reasonable care to furnish the servant a reasonably safe place to work and reasonably safe appliances, and to promulgate and enforce a system of rules reasonably calculated to keep the place safe, is well established. What is reasonable care in a given situation, whether as applied to the question of primary negligence or that of contributory negligence, is always a question for

the jury whenever upon the evidence reasonable minds might reach different conclusions. *Richmond v. Tacoma R. & Power Co.*, 67 Wash. 444, 122 Pac. 351; *Williams v. Spokane*, 73 Wash. 237, 131 Pac. 833. It is also elementary that, on a motion for a nonsuit, the plaintiff is entitled to the benefit of every inference favorable to his cause of action which can reasonably be drawn from the evidence.

Measured by these principles, we are clear that, both on reason and the better considered authorities, the evidence was sufficient to take the question of respondents' negligence to the jury. It shows that the respondent had installed this elevator for the use of a large number of employees, approximately one hundred using it every day, some of them several times a day. No means whatever were provided for the safe use of the elevator. No system of bells or other warning device was installed. No rule was promulgated or enforced to obviate the danger of attempted simultaneous use of the elevator from the two floors. While there was evidence that there were two stairways leading from the restaurant floor to the basement, one of these was dark, steep, crooked and narrow and unfit for use, especially in carrying packages. The door to the other was part of the time kept locked and was locked on the morning of this accident. It plainly appears that employees were not expected to use either of these stairways for the purpose of carrying supplies from one floor to the other. It is clear that, notwithstanding the lack of any provision for its safe use, appellant and other employees were expected to use this elevator for the purpose for which he was using it at the time of his injuries. In a comparatively recent case in which the facts were almost an exact parallel with those here presented, and, indeed, so far as they present any material difference were more favorable to the employer than those presented here, the supreme court of New York held for the employer on the ground that there was a total failure of proof of negligence, Judge McLennan dissenting. *Knickerbocker v. General R. Signal Co.*, 133 App. Div. 787,

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118 N. Y. Supp. 82. On appeal to the court of appeals, that court, without a dissent, reversed the supreme court and remanded the case for a new trial. *Knickerbocker v. General R. Signal Co.*, 209 N. Y. 404, 103 N. E. 765. The grounds of reversal are well expressed as follows:

"We are of the opinion that the evidence presented a question of fact for the jury. The danger of the attempted simultaneous use of the elevator by different employees on the ground and gallery floors was so obvious that a jury might find negligence on the part of the employer in failing to make any provision whatever by rule or otherwise to guard against it. The fact that a custom had grown up among the men to give some sort of a signal by shaking the cable or by calling out does not relieve the master of the performance of his duty. Of course, the chances of accident would increase as the number of floors increased, but the danger would be no less obvious with only two floors in a factory employing from 200 to 250 men, any one of whom was at liberty to use the elevator at will. It is unnecessary to prove by experts or by the experience of others the necessity of guarding against a danger so obvious that the men themselves, without any requirement of the master, were accustomed to signal. Though knowing of the custom, the employer should have anticipated the likelihood that, through carelessness or inadvertence, an employee might omit to give the signal and should at least have enforced the custom by a rule, the violation of which might involve some punishment. It is unnecessary to determine what would be the most effective way to guard against the danger, and of course the employer would not be guilty of negligence for failing to use the best way. The legal proposition is that the failure of the employer to take any measures whatever to guard against an obvious danger arising from the method of conducting his business presented a question of fact for the jury."

See, also, *Nichols v. Searle Mfg. Co.*, 134 App. Div. 62, 118 N. Y. Supp. 651; *Stokes v. Barber Asphalt Paving Co.*, 134 App. Div. 363, 119 N. Y. Supp. 37; *Coogan v. Aeolian Co.*, 87 Conn. 149, 87 Atl. 563.

Respondents contend that the proof was insufficient to show negligence, in that there was no evidence of a general custom

or usage of other employers using such elevators to adopt any particular system of rules for warning or any particular system of signal devices. In other words, that the evidence offered no standard by which to measure reasonable care. One case is cited so holding, two judges dissenting, on a state of facts somewhat similar to those here presented. *Zebrowski v. Warner Sugar Refining Co.*, 83 N. J. L. 558, 83 Atl. 957, 46 L. R. A. (N. S.) 238. But the reasoning in that case seems to us much less sound and convincing than that presented in the more recent New York case above quoted. In the first place, it seems to us that custom cannot, as a matter of law, relieve the master from the positive duty to furnish a reasonably safe place and reasonably safe appliances and promulgate reasonable rules for their use, looking to the safety of his servants. In this, as in other situations, it is almost impossible to find any two cases in which all the circumstances, surroundings and conditions are identical. Obviously, therefore, no absolute standard of reasonable care can be fixed, either by custom or otherwise. We believe that the better rule is that which this court and the courts generally have adopted, that, where the question is one of reasonable human conduct, it is always for the jury wherever upon the facts of the given case the minds of reasonable men might differ. *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4. In the second place, if, as a matter of fact, the employment of signals in the operation of an elevator such as this is not customary, that fact would be a mere matter admissible in defense to be submitted to the jury with the other evidence on the question of reasonable care.

Respondents contend that, even assuming that the question of primary negligence was one for the jury, appellant in any event assumed the risk of injury in using the elevator. It is argued that all of the obvious risks, even those of extraordinary danger resulting from the negligence of the master to perform a positive duty, are, as a matter of law, assumed by a servant in the absence of a complaint to the master and

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a promise on the master's part to remove the danger. The rule thus broadly stated without qualification is not the law. In the case before us, there was a standing order posted at the entrance to the elevator: "Use the elevator." In addition to this, there was evidence that the employees had been specifically directed to use it. True, the sign may not have been there that morning, but the order it conveyed had never been countermanded. It is only where the danger of the act which the servant undertakes is not only open, patent and obvious alike to man and master and equally appreciated by both, but is so plain that reasonable men could not differ as to its existence, and so imminent that a reasonably prudent man would not undertake the act at all, that the servant assumes the risk in obeying the master's order. The rule is thus tersely stated by the supreme court of Ohio:

"The clear result of the best considered cases is, that where an order is given a servant by his superior to do something within his employment, apparently dangerous, and, in obeying, is injured from the culpable fault of the master, he may recover, unless obedience to the order involved such obvious danger that no man of ordinary prudence would have obeyed it; and this is a question of fact for the jury to determine under proper instructions, and not of law for the court." *Van Duzen Gas etc. Co. v. Schelies*, 61 Ohio St. 298, 309.

See, also, *Waterman v. Skokomish Timber Co.*, 65 Wash. 234, 118 Pac. 36; *Williams v. Spokane*, 73 Wash. 237, 131 Pac. 833; *Rogers v. Valk*, 72 Wash. 579, 131 Pac. 231.

But it may be insisted that the sign was not an order. If it was not, the query arises, what was it there for? It is not claimed that this elevator was used or intended to be used by the public. It was almost wholly used by employees such as the appellant. The doctrine of assumption of risk, whether assumed to be founded in the fiction of an implied contract with pay commensurate with the danger, or whether it be referred to the maxim, *Volenti non fit injuria* (3 Labatt, Master and Servant, 2d ed., § 1285), is artificial and harsh at best. It should not be extended beyond its reasonable limits.

It must be remembered that the plan of the establishment and the coordination of work is that of the master, deliberately adopted without consulting the servant. In adopting the plan, the master must be assumed to have considered it with a maturity and deliberation not possible to the servant absorbed in the details of his daily duties. Whenever, therefore, there is room for reasonable difference of opinion as to whether the servant so appreciated the danger as to make it reckless to proceed, the question is one for the jury, especially where the servant is proceeding under an order of any kind, however communicated. As said by this court in *Bailey v. Mukilteo Lumber Co.*, 44 Wash. 581, 87 Pac. 819:

“Any other theory in law would be harsh and unjust. Hence, the courts generally have decided that the servant will not be charged with assuming the risk of a place unless the peril is so apparent that there could be no conflicting opinion between men of ordinary prudence and understanding; and when this appears plainly, and then only, it becomes the duty of the court to hold that as a matter of law the risk was assumed.”

Respondents cite and mainly rely upon the case of *Danuser v. Seller & Co.*, 24 Wash. 565, 64 Pac. 788, which is also an elevator case. In that case, however, the master had provided a means of signalling, but the employees themselves, with the injured man's knowledge, had habitually neglected to use it. The sole negligence charged was the failure on the master's part to enforce the rule for the use of the signals. The injured man not only knew of the continued failure to use the signal, but apparently participated in that failure. In such a case, though the defense is referred to in many cases, as in the case cited, as an assumption of risk, it is really in its essentials a case of contributory negligence. 4 Labatt, Master and Servant (2d ed.), § 1362. That the real basis of the *Danuser* decision rests in the fact that the injured man there evidently approached an open shaft without taking any pains to discover whether the elevator was in

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position or not, thus making a clear case of contributory negligence, is shown by the closing paragraph of the opinion. In view of the fact that, in the case before us, there was a standing order to use the elevator and no means were provided for giving any sort of signal, and in view of the further fact that appellant testified that he did not appreciate or think of the danger because of his absorption in his work, we are constrained to hold that the question whether he assumed the risk was one for the jury.

The question of negligence of a fellow servant is not involved. The positive duty to furnish a safe place to work and safe appliances is a nondelegable duty of the master. It makes, therefore, not the slightest difference who started the elevator, whether an employee of the respondents or, as suggested by counsel, a delivery man. It must be assumed that, had there been some automatic or other signal system, it would have performed its office or a signal would have been given, no matter who used the elevator.

Nor do we find that the appellant can be charged with contributory negligence as a matter of law. He was using the elevator at the time of his injury for the purpose for which it was intended and in the only manner in which it could be used. There was no evidence that any added precaution on his part could have saved him from the injury. He testified that he looked up but could see nothing to indicate that any one was in the act of starting the elevator. If he was justified in using the elevator at all, there is nothing in the evidence to indicate any lack of care on his part in using it in the only way that it could be used.

Upon the entire record, we are clear that the case was for the jury upon every issue involved. The judgment is reversed, and the cause is remanded for a new trial.

MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 13155. Department One. September 15, 1916.]

**E. L. BLANCK *et al.*, Respondents, v. PIONEER MINING
COMPANY *et al.*, Appellants.¹**

MINES AND MINERALS—SALE—CONTRACTS—CONSTRUCTION—“INCLUDING.” In a contract for the sale of a mine under which the net profits were to be determined by deducting the actual expenses of the labor, “including” the wages of men, compensation for teams, cost of board, lodging, fuel and 25 cents per miner’s inch for water, the word “including” introduces an enlarging definition of the preceding general words “actual cost of labor,” but excludes further enlargement than that furnished by the enlarging clause; hence, does not include cost of materials or supplies such as shovels, picks and lumber.

SAME. Such clause does not authorize a charge for water at more than the specified rate for water used; notwithstanding the method of mining was changed from steam and low pressure water to high pressure water, increasing the amount of water used but lessening the cost of the operation, where the method was under the absolute control of the operator of the mine making the change.

SAME—SALE—VALIDITY—EQUITY—SPECULATIVE CONTRACT. The fact that a mine could not be worked at a profit without a change to the hydraulic method, greatly increasing the amount of water to be used and charged for at a specified rate in figuring the net profits, does not authorize a court of equity to grant relief on the theory that it would be unconscionable in an action for an accounting to enforce the contract; as the court cannot relieve from and nullify speculative contracts.

EVIDENCE—PAROL TO VARY WRITING—SUFFICIENCY—MINING CONTRACT. An oral modification of a mining contract with reference to the amount to be charged for water is not established where evidence of notice of the change was vague and contradicted and the other parties to the contract never agreed to pay the higher charge.

ESTOPPEL—IN PAIS—SILENCE—PREJUDICE. An estoppel to object to an increased charge for water used under a mining contract, upon changing to the hydraulic method, is not created by silence following the rendering of a statement of the profits showing the increased charges, where the statement was not rendered until more than half of all the expense had been incurred for high pressure water, and under the contract there was no right to make such increased charge; since the silence did not actually mislead the other party or operate as a fraud.

¹Reported in 159 Pac. 1077.

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SAME—BURDEN OF PROOF. The burden of proving that silence, to create an estoppel operated as a fraud or was intended to mislead and would be acted upon, is upon the party invoking the estoppel.

ACCOUNT STATED—ACQUIESCENCE. The rendition of a statement of an account containing deductions does not create an account stated, though not objected to, where there was no right to make the deductions and no reasonable grounds for belief that the other party would rely or act upon silence or acquiescence.

CONTRACTS — CONSTRUCTION BY PARTIES — PAROL EVIDENCE. Contemporaneous construction cannot be invoked by parol evidence as against the clear terms of an unambiguous written contract.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 31, 1915, upon findings in favor of the plaintiffs, in an action for an accounting, tried to the court. Affirmed.

Cornelius D. Murane (Metson, Drew & Mackenzie, of counsel), for appellants.

Lyons & Orton, for respondents.

ELLIS, J.—Action in equity for an accounting. The following facts are undisputed. Prior to September 1, 1909, plaintiffs owned a leasehold interest in "Bench Claim Number Six Below Good Luck on the Left Limit of Anvil Creek," in the Nome Mining District, in Alaska, in the following proportions: C. A. Vogel one-eighth, E. L. Blanck one-half, H. B. Ames three-eighths. Their lease authorized them to extract the gold, paying to the owners of the claim a royalty of thirty-two and one-half per cent of the gross output. On September 1, 1909, by written agreement, they sold their interests to defendant Lindeberg for a total consideration of \$70,000, of which \$55,625 was then paid in cash. The balance, \$14,375, was to be paid to plaintiffs in proportion to their respective interests, at times, in manner, and under conditions as follows:

"When the party of the second part shall have realized as net profits from the working of said claim the sum of \$55,625, there shall be paid monthly thereafter, to the parties of

the first part, one-half of the additional net profits derived from the working of said claim, until the parties of the first part shall have received the said additional sum of \$14,375.

"The net profits hereinbefore mentioned shall be construed to mean the net profits of the entire claim including the Neussler one-fourth interest and shall be computed and calculated in the following manner:—From the gross amount of the gold produced from said claim shall first be deducted the royalty to be paid to the owners, and the only further deduction to be made shall be the actual expense of the labor engaged in the mining operations thereon, including the wages of the men, and reasonable compensation for any teams used, also cost of board and lodging for men employed, cost of all fuel used, and a charge of twenty-five cents per miner's inch of eleven and one-half gallons for each twenty-four hours of water used in mining on said claim."

Defendant was to have exclusive management and control of the mining operations and agreed to keep a full, true and correct account of the expenses incurred and of the gold produced, and to allow plaintiffs to inspect and take copies of such account, if desired, at any and all convenient times.

Defendant Lindeberg was president and manager of defendant Pioneer Mining Company. He at once took possession of the claim and proceeded to extract the gold from it, operating through that corporation. No question is raised as to his right to do so.

Preparatory to sluicing, it was necessary to thaw the perpetually frozen gravel containing the gold. This could be done by either of two methods. One by introducing steam through steel pipes called points, in which case high pressure water was unnecessary, both the thawing and hoisting to the sluice boxes being done by steam; the other, by playing a stream of water on the gravel bank, in which case high pressure water was essential and could be used both for thawing and raising the gravel to the sluice boxes by hydraulic elevators. The latter method eliminated the use of an engine, the expense of fuel for generating steam, and reduced the number of men necessary to perform the work.

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Prior to the sale, plaintiffs had been operating by the former method, and defendants so continued till in 1910, when the Pioneer Mining Company acquired control of the Miocene Ditch Company, whose ditch was high enough to produce a pressure sufficient to make the hydraulic method practicable. Thereafter defendants employed the latter method. Through the Miocene ditch, water could be delivered at the mine at a cost of about fifty cents per miner's inch. Defendants operated the mine during the latter part of 1909 and the full mining seasons of 1910, 1911 and 1912. These operations exhausted the claim. It is admitted that the total amount extracted by defendants was \$269,838.86 in gold. Defendants, in their accounts, in addition to unquestioned rightful deductions for royalties, low pressure water and labor expenses, charged as expenses and deducted from this gross output \$11,133.46 for material and supplies, and \$60,-296.33 for high pressure water, charging fifty cents per miner's inch computed at nine gallons to the inch. The latter item computed at eleven and one-half gallons to the inch would amount to \$47,187.50, and if computed at twenty-five cents an inch would amount to \$23,593.75. Disputed questions of fact will be considered in our discussion.

Defendants' statement reduced the net profits much below the \$55,625 which, under the contract, they were entitled to retain from the first net profits. Plaintiffs insist that, in computing net profits, nothing should be deducted for materials and supplies; and for the water used, only twenty-five cents for each miner's inch of eleven and one-half gallons. Such was the final issue. The trial court, adopting the latter view, found that the total net profits were \$80,777.03. This would leave, after deducting the \$55,625, the sum of \$25,-152.03, one-half of which under the contract plaintiffs would be entitled to in the proportion of their respective interests. The sum of \$650, prior to suit, had been paid to Blanck. The court accordingly entered judgment in favor of Blanck for

\$5,638, in favor of Ames for \$4,716, and in favor of Vogel for \$1,572, with interest on these sums. Defendants appeal.

Appellants contend that, in the paragraph of the contract above quoted defining net profits, the clause "the only further deductions to be made shall be the actual expense of the labor engaged in the mining operations thereon, including the wages of the men," etc., must be construed as including in the deductions the cost of all materials and supplies necessary to enable the men employed to perform their work; because, as it is argued, the word "including" is a term of enlargement and not a term of limitation, and necessarily implies that something is intended to be embraced in the permitted deductions beyond the general language which precedes it. But granting that the word "including" is a term of enlargement, it is clear that it only performs that office by introducing the specific elements constituting the enlargement. It thus, and thus only, enlarges the otherwise more limited preceding general language, "the actual expenses of the labor engaged," by making it embrace not only "the wages of the men and reasonable compensation for any teams used" (which the preceding general language alone would have embraced in any event), but "also cost of board and lodging for men employed, cost of all fuel used, and a charge of twenty-five cents per miner's inch of eleven and one-half gallons for each twenty-four hours of water used in mining on said claim," which the preceding general language otherwise would not have covered. The word "including" introduces an *enlarging definition* of the preceding general words, "actual cost of the labor," thus of necessity excluding the idea of a further enlargement than that furnished by the enlarging clause so introduced. When read in its immediate context, as on all authority it must be read, the word "including" is obviously used in the sense of its synonyms "comprising; comprehending; embracing." *Neher v. McCook County*, 11 S. D. 422, 78 N. W. 998; *Hibbard v. Slack*, 84 Fed. 571; *Brainard v. Darling*, 132 Mass. 218; *State v.*

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Montello Salt Co., 34 Utah 458, 98 Pac. 549. We find no warrant in the contract for including in the deductions from the gross output the cost of materials and supplies, such as shovels, picks and lumber.

It is equally plain that, under the contract, appellants were not authorized to charge for any of the water more than "twenty-five cents per miner's inch of eleven and one-half gallons for each twenty-four hours of water used in mining on said claim." The language used is too plain and exact, both as to the charge per inch and in defining the inch, to admit of construction. It is argued that the main object of the contracting parties was to recover the greatest amount of gold at a minimum cost, and that this implied the right to substitute for the steam point method the hydraulic method as a necessary means to attain that end. But the argument is superfluous. The contract itself gave to appellant Lindeberg "the exclusive management and control of said mining operations . . . to be conducted, however, as hereinbefore provided," and it was thereinbefore provided that he should "prosecute diligently and in a minerlike fashion" the work on the claim. Obviously, he had the right to choose his own method of operation within the limits of miner-like work. There is, however, neither provision nor implication in the contract that he might add to the contract charge per miner's inch for water or change the contract definition of the inch, in his deductions to determine the net profits. We are not concerned with the meaning of net profits in the abstract or in other circumstances. By their contract, the parties here have defined net profits, fixing therein the charge of twenty-five cents per inch for water without exception. It is undisputed that the parties knew that high pressure water would cost more than low pressure water, yet in their solemn written contract they did not specify the kind of water to be used nor make any distinction in the charge for water to be deducted, whether high pressure or low pressure were used. The same is true as to the saving of men and fuel resulting from

the employment of the hydraulic method. Both parties, as practical miners, knew that this would result, yet neither saw fit to insert in the contract an increase of the charge per inch for water in that contingency.

But appellants argue, on the theory of specific performance, that, since it was soon demonstrated that the entire claim could not be worked to a profit without the employment of the hydraulic method, it would be unconscionable to enforce the contract as plainly written. Such a doctrine would tend to nullify every speculative contract. Here the whole enterprise was speculative. Each party took a chance on the output of the mine. Suppose it had produced in net profits millions of dollars, could respondents claim the right to anything more than one-half of the first \$28,750 of such profits? Of course not, and the converse is equally palpable. Equity has never presumed to rewrite contracts for parties *sui juris* merely because of disappointed expectations.

"Equity will not relieve against hardship arising from a change in circumstances or the result of subsequent events, *where these should have been in contemplation of the parties as possible contingencies*, when they entered upon the agreement. And of such nature are the ordinary changes like a rise or fall in values, profit or loss in the undertaking, mistakes of judgment, unforeseen events, which yet were fairly possible contingencies, etc." 6 Pomeroy, Equity Jurisprudence, § 797.

Appellants, in their second affirmative defense, alleged in substance that, shortly after their taking possession, they learned, and so advised respondents, that the claim could not be worked at a profit except by the hydraulic process, that respondents then "consented to the change of process in mining and the increased cost for water." They further alleged that respondents, after receiving written statements of account showing the amount paid for water and included in the expenses, did not object to any items of expense so included until long after all mining operations were completed; that appellants relied upon the consent, silence and acquiescence

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of respondents when incurring the expenses, particularly the added expense for water, and that respondents are estopped to dispute the items of account.

The trial court found against appellants on this second affirmative defense and we are clear that the evidence preponderates in favor of that finding. As to the vaguely pleaded oral modification of the contract, the evidence shows no more than that Blanck and Vogel were informed of the change from the old method of mining to the hydraulic method and that it would increase the actual cost of water, soon after the change. Lindeberg testified, "So far as I remember, Mr. Blanck never objected to our change of method of mining, but rather approved it all," and that Vogel "expressed his satisfaction." He also testified that, in the fall of 1910 or 1911, he had a very short conversation with Ames somewhere in Seattle in which he told Ames of the change of method. Ames denied this meeting and this conversation *in toto*. Neither Lindeberg nor any other witness testified that, in any of these conversations or at any other time, either of respondents ever agreed that the actual cost of the high pressure water should be deducted instead of twenty-five cents an inch in determining the net profits as defined in the written contract, or ever consented to any change in that contract, or that such consent was ever requested.

The issue is thus reduced to the claim of estoppel because of respondents' alleged failure to object to certain statements of account sent to them showing charges of fifty cents an inch for high pressure water and charges for materials and supplies. But the evidence shows that neither Blanck nor Ames received any statement including an increased charge for high pressure water until in August, 1911, and it fairly appears that Vogel, though on the ground, received no such statement till in July, 1911. This was after more than half of all the expense ever incurred for high pressure water had been created. Clearly appellants did not rely upon the con-

sent, silence and acquiescence of respondents as to these statements of account when incurring the added expenses for water. Full knowledge of the facts is essential to create an estoppel by silence or acquiescence. *Oliver Ditson Co. v. Bates*, 181 Mass. 455, 63 N. E. 908, 92 Am. St. 424, 57 L. R. A. 289; *Hunt v. Reilly*, 24 R. I. 68, 52 Atl. 681, 96 Am. St. 707, 59 L. R. A. 206. Respondents knew that appellants had adopted the hydraulic process, but they also knew that, under the contract, Lindeberg had the right to adopt whatever method he pleased. They did not know till they received these statements that deductions above the contract charge for water were being made. Certainly until then they were under no duty to speak. Though the evidence on this point was conflicting, the trial court evidently believed—and so do we—that Blanck at least then did object to these charges. But even assuming that none of the respondents then objected, no estoppel arises. Appellants, having proceeded at least till July, 1911, without any possible ground for reliance upon respondents' silence or acquiescence, the presumption must prevail that they continued to use the high pressure water without such reliance. Mere silence, without positive acts, to effect an estoppel must have operated as a fraud, must have been intended to mislead, and itself must have actually misled. The party keeping silent must have known, or had reasonable grounds for believing, that the other party would rely and act upon his silence. The burden of showing these things rests upon the party invoking the estoppel.

"Mere silence on the part of a party will not create an estoppel unless he was under some obligation to speak, and a party invoking such estoppel must show that it was the duty of the other to speak, and that he has not only been induced to act by reason of such silence, but that the other had reasonable cause to believe that he would so act." *Newhall v. Hatch*, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673.

Appellants having for so long proceeded without any possible reliance upon respondents' silence, respondents might

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well have assumed that their attitude was a matter of indifference to appellants and that no speech of theirs would then influence appellants' future conduct. And in fact, as the evidence fairly shows, Blanck's objections in 1911 were wholly unheeded.

It is true that, in the fall of 1909, appellants rendered a statement containing charges for materials and supplies but no excess charge for water, and that no objection was made to this statement until Blanck's objection in 1911. But appellants knew that they had no right, under the contract, to deduct more than twenty-five cents an inch for any water, and no right to deduct anything for materials and supplies. Under the circumstances of this case, their rendition of statements of account containing these deductions, though the statements were not objected to, could not create an account stated nor operate as an estoppel as against respondents to dispute the account and rely upon their contract. *Kusterer Brewing Co. v. Friar*, 99 Mich. 190, 58 N. W. 52; *Gallinger v. Lake Shore Traffic Co.*, 67 Wis. 529, 30 N. W. 790; *Valley Lumber Co. v. Smith*, 71 Wis. 304, 37 N. W. 412, 5 Am. St. 216.

Some contention is made that the failure to object to the 1909 statement amounted to a contemporaneous construction of the contract as to the charge for materials and supplies. But contemporaneous construction cannot be invoked as against the clear terms of an unambiguous written contract. To hold otherwise would be wantonly to impinge the rule that such a contract cannot be varied by parol evidence.

Upon the whole record, we are satisfied that the trial court reached the correct conclusion.

Judgment affirmed.

MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 13165. Department One. September 15, 1916.]

MARK MUNSON, *Respondent*, v. PAULINE P. BALDWIN *et al.*,
Appellants.¹

EVIDENCE—SELF-SERVING DECLARATIONS—OFFER OF COMPROMISE. A party cannot offer in evidence a letter written by him which was a self-serving declaration on the subject in controversy and an offer of compromise, where it was not necessary to prove a demand and it was not in reply to the opposite party.

SAME. Such a letter would not be admissible for the purpose of corroborating the party.

APPEAL — REVIEW — WAIVER OF ERROR — ASKING DIRECTED VERDICT. Asking a directed verdict upon the law of the case upon a plea of *res adjudicata*, does not submit to the court the facts on the merits; and hence does not waive error in directing a verdict on the facts.

JUDGMENT—RES JUDICATA—BAR—COUNTERCLAIMS. Judgment in an action upon a lease for the recovery of the rent of a building is not *res judicata* of a counterclaim for an indebtedness due defendant upon a subsequent agreement to pay defendant for the use of the furniture, and failure to plead such counterclaim in that action does not bar a subsequent action by defendant therefor; since the facts on the matter of the counterclaim do not negative the facts sustaining the former judgment.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 10, 1915, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, in an action on contract. Reversed.

Wm. Hickman Moore, for appellants.

Roney & Loveless, for respondent.

MORRIS, C. J.—Respondent brought this action to recover upon thirteen separate causes of action for the rental value of certain furniture. In the first cause of action it is alleged that, on or about the 20th day of November, 1909, respondent made an oral contract with the appellants to lease to them for an indefinite period all of the furniture and house-

¹Reported in 159 Pac. 1070.

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hold furnishings belonging to and used in connection with the Monterey Apartments, at Seattle, at a stipulated rental of \$100 per month, no part of which had been paid. Each of the other twelve causes of action is similar in language, save that the rent is alleged to be due for each of the twelve succeeding months. Several defenses were interposed, among which was a plea of *res adjudicata* to each cause of action. A jury was impaneled, and at the conclusion of the hearing, the lower court directed a verdict for respondent, upon which judgment being entered, the appeal was taken.

The lower court, over the objection of appellants, admitted in evidence a letter written by respondent to appellant Ewing some twelve months after the use of the furniture under the alleged contract. This letter is too long for full publication. It states that it is a proposition for a full settlement of all matters. After so stating, the writer says, "I wish to set before you my side of the question so that you may be able to pass judgment with a more full knowledge than you now have." Following this is a statement of what respondent contends to be the facts, with argumentative matter in support of such contentions. It also sets forth certain conversations with one Lane, who is claimed by respondent to be the agent of appellants in the leasing of the furniture. The letter ends with this statement: "What I have said to you in this proposition I will not consider at all in any action that I may take upon refusal of yourself to accept this."

In our opinion, the admission of this letter was error. First, it was an offer of compromise, and second, it was a self-serving declaration. It is an established rule of evidence, subject to few exceptions, that a party cannot offer in evidence his own declaration relative to the subject in controversy. The exceptions most often made are where it is necessary to prove a demand, and such a demand is made by letter, or where the letter is in reply to one from the opposite party. This letter falls within neither of these, or within no exception called to our attention. The lower court was of

the opinion that the letter was admissible as showing that Ewing's attention was called to the fact that respondent's claim for the rental of the furniture was based upon an agreement made with Lane as appellants' agent, that it was also admissible for the purpose of corroborating respondent's testimony that he had a previous conversation with Ewing in regard to the matters of difference. Neither one of these propositions would make the letter admissible. There was no necessity for offering the letter upon the first point, as Munson had already testified to two conversations with Ewing in which he stated his claim that he had rented the furniture through Lane for \$100 per month. As to the second point, a witness cannot corroborate himself by his own self-serving declaration. The error in admitting this letter is accentuated when the lower court makes it the basis for an instructed verdict, holding that Ewing's failure to reply to it was a confirmation of the agreement claimed therein to have been made with Lane, and having failed to deny such claim when notified, the appellants are now bound by its assertion.

The next error alleged is in directing an instructed verdict. It is argued by respondent that appellants cannot complain of the instructed verdict because they in turn moved the court to take the case away from the jury. For the sake of the argument, it may be admitted that, when both parties request the court for a directed verdict upon the facts, neither party can thereafter complain that the jury was not permitted to pass upon the facts. Appellant, while asking the court to grant judgment upon the law of the case under their plea of *res adjudicata*, did not submit the facts to the court, but only the question of law involved in such plea.

Upon the question of *res adjudicata*, it is the contention of appellants that respondent's claim for the rental value of the furniture should have been set up as a defense in a former suit in which appellants recovered judgment against respondent for rentals due under the lease of the apartments

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for the months of October and November, 1909. Whether or not such a counterclaim could have been set up is not now an issue. We are only concerned with the further question, Is the failure to so plead it barred by the judgment in the former case? The rule as generally stated is that a judgment is conclusive as to all matters of defense which might and should have been presented in the action. But this rule bars only those facts which negative or are inconsistent with the facts which sustain the former judgment. When the facts relied upon in the subsequent action are neither inconsistent with nor in direct opposition to the facts involved in the former suit, but are facts which may be equally true with the former facts, then there is no bar. 2 Black, Judgments, § 767. The former suit was upon a lease for the recovery of rentals growing out of respondent's use and occupancy of the building. This suit is for the rental value of furniture which respondent claims appellants obligated themselves to pay subsequent to November 20, 1909. We find no inconsistency with the judgment establishing respondent's liability under the lease and an indebtedness to respondent under a subsequent agreement to pay for the use of the furniture. The defense of *res adjudicata* is therefore overruled.

Coming again to the question of the directed verdict, there was a sharp conflict, both as to the rental value of the furniture and the agreement for its payment. This conflict should have been submitted to the jury.

The judgment is reversed, and the cause remanded for a new trial.

FULLERTON, MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 13244½. Department One. September 15, 1916.]

FRANK SHELL, *Respondent*, v. W. R. SVENNSON, *Appellant*.¹

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action to recover the value of property, exempt to plaintiff as a householder and farmer, error in instructions authorizing a verdict for plaintiff if the jury found he was a householder is harmless where it was undisputed that he was also a farmer.

EXEMPTIONS—WAIVER—TIME FOR FILING CLAIM. A claim for exemptions from execution is not waived by a request to postpone the sale in the hope of paying the judgment, when the claim was filed as required by statute within a reasonable time before sale.

SAME—CLAIM—FILING—RELEASE OF PROPERTY. Upon filing a claim for exemptions from execution due to a householder and farmer, it is the duty of the sheriff to release the property where no appraisalment was demanded, as provided in Rem. 1915 Code, § 573.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial should not be granted for newly discovered evidence that is merely cumulative.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered June 10, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover the value of property sold under execution. Affirmed.

Louis A. Merrick and *Eugene H. Beebe*, for appellant.

E. C. Dailey, for respondent.

MOUNT, J.—This action was brought to recover the value of two cows and their calves and a wagon, claimed by the plaintiff as exempt from execution, which property was sold under execution and purchased by the defendant. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff for \$200. The defendant has appealed.

The facts are as follows: On the 29th of January, 1914, Mr. Svensson obtained a judgment against Frank Shell for

¹Reported in 159 Pac. 1076.

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\$106.28. On February 24, 1914, an execution was issued upon that judgment, and the sheriff of Snohomish county levied upon the property in question, and other property belonging to Mr. Shell. At the time of the levy, the sheriff left the property in the possession of Mr. Shell, who asked the sheriff at that time not to notice the property for sale for a few days, when he thought he might be able to pay the judgment. Afterwards the sheriff noticed the property for sale. After notice and before the sale, Mr. Shell made an affidavit, as required by Rem. 1915 Code, § 572, stating that he was a householder, the head of a family, and a farmer, and claiming two cows and their calves and the wagon as exempt under the statute. This affidavit was filed with the sheriff. No demand was made for an appraisement, and no appraisement was had, but the sheriff proceeded on the 3d day of April, 1914, to sell the property. The plaintiff in that action, Svensson, purchased the property. Afterwards this action was brought to recover the value of the property as exempt, and resulted in the judgment above stated.

The court instructed the jury to the effect that, if they found that, at the time of the levy of the execution, the plaintiff was living in Snohomish county with his wife and children, then he was a householder and entitled to his exemption. It is argued that this was error because the jury might have found that he was a resident of the county and a householder, and not a farmer. While this instruction was not technically correct, it was clearly understood, we think, by all the parties, that it was necessary for the jury to find that the plaintiff was a householder and a farmer, before he would be entitled to his exemption of the two cows and their calves *and the wagon*, as provided for in § 563 of Rem. 1915 Code.

There was no dispute that the plaintiff was a married man, living in Snohomish county with his wife and children, and was a farmer at the time of the levy of the execution. So it is apparent that whatever error there was in this instruction was entirely harmless, because the court might readily have

told the jury that it was not disputed that the plaintiff was a farmer at that time.

The court in another instruction told the jury to disregard a conversation which took place between the sheriff and the plaintiff at the time of the levy of the execution. This is alleged as error. It is contended by the appellant that the statements made by the plaintiff in this case to the sheriff at the time the levy was made amounted to a waiver of the right to claim the exemption. It is not claimed that there was any express waiver by the plaintiff at the time of the levy of the execution upon his property, as required by Rem. 1915 Code, § 571, and we think there is no inference of that kind to be drawn from the statements then made. The plaintiff then told the sheriff to postpone the sale for a time because he thought he might be able to pay the judgment. There was evidently in his mind at that time no idea of waiving his right to claim the exemption. Afterwards he filed the claim for the property as exempt as required by the statute. This court has held that a claim for exempt property may be made within a reasonable time before sale. *State ex rel. Hill v. Gardner*, 32 Wash. 550, 73 Pac. 690, 98 Am. St. 858; *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480.

We have no doubt, under the facts in this case, that it was the duty of the sheriff, on the filing of this claim, to release the property in case no demand was made for an appraisal, as provided for by Rem. 1915 Code, § 573. The evidence which was stricken was clearly not competent to show a waiver, and there was no error in taking it from the consideration of the jury.

It is next claimed that the court erred in denying the motion for a new trial. This motion was based upon newly discovered evidence. But this evidence was simply cumulative, and the trial court so concluded, and denied the motion. We think there was no error in this.

The judgment is affirmed.

ELLIS, FULLERTON, and CHADWICK, JJ., concur.

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[No. 13383. Department One. September 15, 1916.]

FRANK M. SKINNER *et al.*, Appellants, v. IDA C. MCCRACKAN
et al., Respondents.¹

EJECTMENT—BETTERMENTS—STATUTES—ADVERSE POSSESSION—GOVERNMENT LAND. In ejectment, there can be no allowance for betterments placed on the land while the title was in the United States, under Rem. 1915 Code, § 797, authorizing a counterclaim for the value of permanent improvements made and taxes paid by a defendant holding in good faith under color or claim of title adversely to the claim of plaintiff; since there can be no adverse holding against the United States.

SAME—BETTERMENTS—TAXES—IMPROVEMENTS. Such act authorizes a counterclaim for taxes paid which became a lien on the land subsequent to the issuance of a patent therefor; and for a pipe line which was a permanent improvement to the land.

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed upon appeal where the trial court was in the better position to determine the facts.

Appeal by plaintiffs from a judgment of the superior court for Yakima county, Grady, J., entered November 7, 1914, upon findings favorable to the plaintiffs, in an action of ejectment, tried to the court. Reversed.

McAulay & Meigs, for appellants.

Englehart & Rigg, for respondents.

MOUNT, J.—This action was brought in ejectment to recover possession of about three acres of land lying south of the right of way of the Sunnyside canal, in Yakima county. The complaint alleged ownership and right of possession in the plaintiffs. The defendants, for answer, denied generally the allegations of the complaint, and after several affirmative defenses, pleaded payment of taxes and construction of betterments amounting to \$961.48 while holding in good faith

¹Reported in 159 Pac. 977.

under color and claim of title. For reply, the plaintiffs denied the affirmative matter set forth in the answer.

Upon these issues the case was tried to the court without a jury. The court made findings of fact and conclusions of law and entered a judgment awarding the land to the plaintiffs, and adjudging that the value thereof, exclusive of the improvements, at the time the defendants took possession, was \$55; that the plaintiffs' damages for the withholding of possession amounted to \$45; that the value of the improvements and the taxes paid by the defendants was \$742.03; and that this amount should be set off against the damages; and that neither party should recover costs. The plaintiffs have appealed from that part of the judgment fixing the value of the lands at \$55; damages at \$45; and fixing the value of the betterments at \$742.03.

It appears that, in the fall of 1904, the defendants purchased a tract of land south of the three acres in dispute. This three acres was supposed to be a part of that tract, and a deed was executed to the defendants describing the tract by metes and bounds, including the three acres. At that time the title to this three acres was in the United States, and not in the defendants' vendor. Afterwards, in January, 1908, the Northern Pacific Railway Company acquired title to the three acres, with other lands, from the United States, and a patent was issued therefor. Thereafter the plaintiffs, the appellants here, by mesne conveyances, became the owner of the three-acre tract. In the year 1905, while the title to this three-acre tract was in the United States, the respondents purchased therefor a water right for \$102.60, fenced the three acres at an expense of \$70; cleared the land at an expense of \$59.40; and constructed a board flume at an expense of \$11. At about the same time, they planted about two acres of the tract to peach trees. In 1907, the respondents purchased an additional water right for \$19.80. In November, 1909, the respondents paid taxes for the year 1908 amounting to \$5.96; in 1910, taxes for 1909, \$6.22;

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February 17, 1911, taxes for 1910, \$4.12; and in May, 1911, building pipe line, which was valued by the court at \$240; and on February 15, 1912, taxes for 1911, \$5.11.

It is argued by the appellants that the court erred in allowing all the items which were expended by the defendants upon the land while the title thereto was still in the United States. Our betterment statute is as follows:

"In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant." Rem. 1915 Code, § 797.

It is plain from this statute that, before the counterclaim for betterments in the way of permanent improvements can be allowed, the person claiming for such improvements must be holding in good faith under color or claim of title adversely to the claim of the plaintiff. *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073; *Gould v. White*, 62 Wash. 406, 114 Pac. 159. As we have seen above, the title to this property, both legal and equitable, was in the United States prior to January 6, 1908. The defendants went into possession and made a large part of these improvements in 1905 while the title was in the United States. It is plain, therefore, that when these improvements were made upon the property, there was no adverse holding by the defendants, because there can be no adverse holding against the United States. Rem. 1915 Code, § 790.

In the case of *Hawke v. Deffebach*, 4 Dak. 20, 22 N. W. 480, where the defendant was dispossessed and made claim for improvements, and where his predecessors in interest were in the occupation of the land and had made improvements thereon prior to the time the plaintiff initiated his right by

which he subsequently obtained title from the government, and where there was a statute like our own, the court said:

"For it is manifest that, standing by itself, the territorial statute could have no operation or effect so long as these lands were the property of the United States, and that the patent of the government would carry with it the full and unincumbered title, free from every adverse claim, since it would be impossible for anyone to hold adversely or in good faith against the government, and hence to acquire any right, legal or equitable, to compensation for improvements erected while the title was yet in the United States. *Steel v. Smelting Co.*, 106 U. S. 456."

This judgment was afterwards affirmed by the supreme court of the United States in *Deffebach v. Hawke*, 115 U. S. 392. See, also, *Woodruff v. Wallace*, 30 Okl. 355, 41 Pac. 357; *Chavez v. Chavez de Sanchez*, 7 N. M. 58, 32 Pac. 137.

It follows that, when the United States issued a patent to the railway company, all the improvements which were then upon this three acres went with the land, and the defendants would have no right to claim betterments for the improvements then upon the land. We are of the opinion, therefore, that the trial court erred in allowing to the defendants the costs of the improvements placed upon the land prior to the disposition thereof by the United States in 1908.

The appellants further argue that the trial court erred in allowing for the taxes paid upon the land by the defendants after 1908. The taxes were a lien upon the land. They were paid by the defendants. And, as a matter of course, they are entitled to be reimbursed therefor under the terms of the statute. It is true the plaintiffs claim to have paid the taxes upon this land in paying upon a larger tract owned by them. But it is not disputed that the defendants paid the taxes upon this particular tract, and it is not disputed that the defendants paid the taxes before any payments were made by the plaintiffs, if they were due from the plaintiffs. We think the trial court properly allowed the amount of the taxes stated above.

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Opinion Per Mount, J.

It is next urged as error that the court allowed to the defendants the value of a pipe line installed in the year 1911 at \$240. There is evidence in the record that this pipe line is a permanent improvement and betterment to the land, and of value thereto. There is some dispute upon this question, but we are of the opinion that the trial court properly found upon that item.

It is next argued that the trial court erred in finding the value of the land at \$55. There were different estimates made of the value of the land, all the way from \$5 an acre to \$150 an acre. We think the trial court was in a better position to judge of the value of the land upon the testimony than we are, and, for that reason, we are not disposed to disturb either the finding of value of the land or the rental value thereof at \$45, as found by the court.

For the reasons above stated, the judgment of the trial court is reversed, and the cause remanded with directions to enter a judgment in counterclaim in favor of the defendants for taxes paid amounting to \$21.41, and for betterments, \$240, in accordance with Rem. 1915 Code, § 799, the appellants to recover costs in this court.

CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 13235. Department One. September 26, 1916.]

CHARLES FLESSHER, *Respondent*, v. CARSTENS PACKING
COMPANY, *Appellant*.¹

FOOD—SALES—IMPLIED WARRANTY — ACTIONS — PLEADING — NEGLIGENCE. An action on the case as for a tort lies for breach of the implied warranty of the wholesomeness of food sold by a retailer for immediate human consumption; and in a complaint pleading the facts, it is not necessary to allege the legal conclusion of negligence.

SAME—PLEADING SCIENTER. In an action for breach of the implied warranty of the wholesomeness of food sold for immediate human consumption by a retailer who was also the manufacturer, it is not necessary to allege or prove scienter, regardless of whether the action be called one on warranty or of negligence.

SAME—LIABILITY FOR INJURIES—QUESTION FOR JURY. The liability of a retailer and manufacturer of dried beef sold for immediate human consumption, is a question for the jury, where there was evidence that plaintiff and others eating meat cut from the same piece soon after purchasing it became ill and physicians testified that plaintiff's illness was, in their opinion, caused by the unwholesome condition of the meat, notwithstanding the testimony of chemists that other parts cut from the same piece were not infected.

APPEAL—REVIEW—EVIDENCE—WAIVER OF ERROR. Error cannot be predicated upon the failure of a long hypothetical question to include all matters subsequently adduced by appellant where appellant had opportunity to cross-examine and include such elements.

EVIDENCE—OPINION EVIDENCE—HEARSAY. The opinion evidence of physicians as to the cause of plaintiff's sickness is not objectionable as hearsay because based in part upon the history of the case detailed to them by the patient, where it was necessary to take into consideration both the subjective and objective symptoms.

APPEAL — REVIEW — INSTRUCTIONS — REQUESTS. Error cannot be based upon the refusal of requested instructions sufficiently covered in the general charge.

DAMAGES—PERSONAL INJURIES—EXCESSIVE DAMAGES. A verdict for \$3,600 for damages resulting from eating unwholesome meat sold by the defendant is not excessive, although plaintiff lost no great amount of time from his work, where it appears that it resulted in offensive uncontrollable diarrhea and recurrent spasms, and that his condition was permanent and progressive.

¹Reported in 160 Pac. 14.

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Appeal from a judgment of the superior court for Kitsap county, French, J., entered July 24, 1914, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Kerr & McCord, for appellant.

Garland & McLane, for respondent.

ELLIS, J.—Action for damages for injuries to plaintiff, claimed to have been caused by eating diseased dried beef prepared and sold by defendant to plaintiff for immediate consumption as human food.

It is alleged that, as a part of its business, defendant prepares and sells at retail flesh of animals for human food; that on or about October 15, 1912, defendant negligently and carelessly sold and delivered to plaintiff certain dried beef which was poisonous, decayed, unhealthful and unfit for human food, which fact was unknown to plaintiff, who believed that the meat was sanitary and fit for food, and that he purchased it for food for himself and family, which fact was known to defendant; that plaintiff ate of the meat soon after purchasing it and that it caused him to become ill, to be thrown into fits and spasms; that his digestive system has become so impaired as to render his life a burden to himself and family; that he has lost control of his excretory organs, has frequent spasms, and that his health has become permanently impaired, all because of eating the meat so sold to him by defendant. On the first trial, a verdict was returned and judgment entered in favor of plaintiff. On defendant's appeal, the judgment was reversed on the ground that the action being a common law action for negligence, the trial court committed error in reading to the jury certain of the provisions of the pure food statute, Rem. 1915 Code, §§ 5453, 5455. *Fletcher v. Carstens Packing Co.*, 81 Wash. 241, 142 Pac. 694.

The evidence was voluminous, resulting in a statement of facts of nearly five hundred pages. Lack of space forbids

more than a mention of its salient features. The evidence adduced on behalf of plaintiff shows that, about the middle of October, 1912, he purchased a small quantity of dried beef from the defendant at its market in Bremerton, Kitsap county, late in the afternoon; that he placed it on a shelf in the family cupboard in the original paper in which it was delivered to him by the salesman; that next morning he placed a piece of it between two slices of bread, wrapped the sandwich so made in a napkin, took it with him to his work in the navy yard, and at noon ate the sandwich and soon after became very sick, was attacked with violent vomiting, retching, spasms, nausea, running off of the bowels and became unconscious; that, since that time to the time of trial, there has been a frequent recurrence of these symptoms and he has since been subject to frequent fits, spasms, convulsions and periods of unconsciousness. Several physicians who had examined him, and others from hypothetical questions, expressed the opinion that his condition is the result of meat poisoning, is permanent and will be progressive. Others testified that, in their opinion, his condition is not the result of meat poisoning but is produced by other causes.

Plaintiff's daughter ate of the same meat during the noon hour following the day of its purchase and a few minutes afterwards became sick with nausea and diarrhea, exhibiting the same symptoms as those of plaintiff but in a slighter degree. Other members of plaintiff's family, including his son, another daughter and his wife ate of the same food eaten by plaintiff and his daughter on the day in question, excepting the dried beef, and did not become sick. The bread used by the plaintiff and his daughter in the sandwiches was part of a considerable quantity made by plaintiff's wife, all of which was eaten by the members of the household, both before and after the time in question, with no bad results. One Edmondson purchased dried beef at the same time of plaintiff's purchase, cut from the same larger piece, took it home with him, ate a part of it without bread or anything else and in

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a few moments became violently sick, exhibiting the same symptoms as those of the plaintiff. Two other men, near the same time, purchased dried beef from defendant which the evidence tends to show was cut from the same larger piece. Both of them became sick soon after eating of the meat, exhibiting symptoms similar to those of the plaintiff. Evidence was adduced on behalf of the defendant covering the whole process of its preparation of dried meats and its care of the meats, all tending to show that the meat in question was free from decay, filth or impurities and that no deleterious or poisonous preservatives were used in its preparation. It was also shown that all meats prepared by defendant are subjected to inspection by United States government inspectors, and that no meat prepared by defendant is offered for sale without being submitted to and passing such inspection. There was also evidence that two or three other persons ate of meat cut from the same large piece as that sold to plaintiff, without injurious results. Some of the same piece was also submitted to two chemists for examination, both of whom testified that they found no putrefactive bacteria or other impurities which would produce ptomaine poisoning. The jury returned a verdict for plaintiff in the sum of \$3,600, on which judgment was entered after defendant's motions for judgment *non obstante veredicto* and for a new trial had been denied. Defendant appeals.

It is first contended that the court erred in refusing to grant appellant's motion for judgment *non obstante veredicto*. This contention is apparently based upon a two-fold ground: (1) that the complaint, as construed on the former appeal, sounded in tort through negligence and respondent was permitted to recover only on the theory of implied warranty resting in contract, which was not specifically pleaded; (2) that, in any event, no negligence was established, in that there was neither allegation nor proof that appellant knew that the meat was unwholesome.

As to the first ground, it is a sufficient answer to say that, where there is a positive duty created by implication of law independent of the contract, though arising out of a relation or state of facts created by the contract, an action on the case as for a tort will lie for a violation or disregard of that duty. *Sharpe v. National Bank of Birmingham*, 87 Ala. 644, 7 South. 106; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688; *Hinks v. Hinks*, 46 Me. 423; 6 Cyc. 688. The implied warranty of the wholesomeness of food placed on sale, whenever it exists at all, arises as an implication of the common law. "The liability does not rest so much upon an implied contract as upon a violation or neglect of a duty voluntarily assumed." *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923. In such a case, it is sufficient to set forth the facts from which the duty springs, the neglect of that duty, and resulting injury. It is not necessary to aver in terms the existence of the relation which in law casts the duty upon the vendor, or that he knew of the injurious quality of the food. The negligence consists in the violation of the duty to know, under such circumstances that he should have known and refrained from causing the injury. *Bishop v. Weber, supra*. Respondent, having pleaded the facts, was not required to plead the warranty as a legal conclusion in order to rely upon it.

As to the second ground, it is clear from the foregoing that, if respondent had the right to rely upon an implied warranty that the meat was sound and wholesome, it was not incumbent upon him either to plead or prove that appellant actually knew that the meat was unwholesome. He was only required to plead and prove such facts, to the satisfaction of the jury, from which the law raises the implied warranty. *Scienter* need not be pleaded, and it follows that it need not be proven. *Tomlinson v. Armour & Co., supra*; *Parks v. Yost Pie Co.*, 93 Kan. 334, 144 Pac. 202, L. R. A. 1915C 179.

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It is said in the case last cited:

"The degree of care required of a manufacturer or dealer in human food for immediate consumption is much greater by reason of the fearful consequences which may result from what would be slight negligence in manufacturing or selling food for animals. In the latter a higher degree of care should be required than in manufacturing or selling ordinary articles of commerce. A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption. Practically he must know it is fit or take the consequences, if it proves destructive."

See, also, to the same effect: *Neiman v. Channellene Oil & Mfg. Co.*, 112 Minn. 11, 127 N. W. 394, 140 Am. St. 458; *Meshbesh v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 119 N. W. 428, 131 Am. St. 441.

It is true that the Minnesota cases were actions brought under the pure food statute; but it is obvious that, where there is an implied warranty at common law, the same rule as to the plea and proof of *scienter* must prevail. This court inferentially approved the same rule in the case of *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915 C 140, 48 L. R. A. (N. S.) 213, a common law action grounded in negligence, in which actual *scienter* was neither pleaded nor proved, yet we extended the doctrine of implied warranty to a suit by a purchaser from the retailer against the manufacturer.

Appellant cites one case to the contrary, *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481, 126 Am. St. 436, 15 L. R. A. (N. S.) 884. But in that case, which involved the sale of a fowl, it was held that there was no implied warranty because the purchaser selected the fowl himself from a number offered without reliance upon the skill and judgment of the vendor, and that in such a case the maxim *caveat emptor* applies. Even in that case it was said:

"If the selection is left to the dealer, due care by him is no defense. He is liable for latent unsoundness that could not be discovered."

In the case before us, respondent did not select the beef. He took what the dealer cut from a single large piece in stock and gave to him. True, he saw the larger piece from which the pieces given to him were cut, but there is no pretense that he examined it or selected any particular cut for himself. If the mere seeing and purchasing food on sale makes the purchaser take *caveat emptor*, there can be no such thing as an implied warranty except in case of canned goods. This is the position to which appellant seems to be driven, but it is not the law. It is a general rule, supported by the decided weight of authority, that, upon a retail sale of articles of food by a dealer directly to the consumer for domestic use and for immediate consumption, the law implies a warranty that such articles are sound and wholesome. Such is the rule of the common law and it is strengthened rather than impaired by the more modern decisions. *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Chapman v. Roggenkamp*, 182 Ill. App. 117; *Race v. Krum*, 163 App. Div. 924, 147 N. Y. Supp. 818; *Leahy v. Essex Co.*, 164 App. Div. 903, 148 N. Y. Supp. 1063; *Rinaldi v. Mohican Co.* (App. Div.), 157 N. Y. Supp. 561; *Hoover v. Peters*, 18 Mich. 50; 15 Am. & Eng. Ency. Law (2d ed.), p. 1238. See note to *McQuaid v. Ross*, 22 L. R. A. 195, and many cases there cited. The same rule prevails under the civil law. *Doyle v. Fuerst & Kraemer*, 129 La. 838, 56 South. 906, Ann. Cas. 1913B 1110, 40 L. R. A. (N. S.) 480.

The writer of the opinion in the *Rinaldi* case expresses the personal view that this common law rule is no longer suitable to modern conditions, but nevertheless follows the general rule as recognized by the New York court in the *Race* case. He expresses no reason for that view and we can conceive of none, except in the case of canned goods not purchased directly from the manufacturer, in which case, for the reasons

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stated in the *Mazetti* case, the manufacturer is liable directly to the purchaser even for an injury to his business, and it would seem, *a fortiori*, for injury to the health of a purchaser for immediate consumption. In one case it has been held that a retail dealer who sells canned food, which the buyer knows he did not prepare, does not impliedly warrant its wholesomeness. *Julian v. Laubenberger*, 16 Misc. Rep. 646, 38 N. Y. Supp. 1052. But this is far from holding that, as to other than canned goods, a retail vendor for immediate consumption is not a warrantor, and especially far from holding that a retail vendor who sells goods of his own preparation directly to the consumer for immediate use, as in the case here, is not a warrantor.

We are persuaded that the general rule of implied warranty as we have stated it is the sound one. It rests, as we said in the *Mazetti* case, not alone on privity of contract, but upon "the demands of social justice." It has its ethical basis in the reasonable presumption that the vendor, if a regular retail dealer, and especially if he be also the manufacturer, has the better means of knowledge of the character of the food which he offers for sale. As said in *Wiedeman v. Keller*, *supra*:

"In this case, however, the appellee was a regular retail dealer, and as such he sold the meat to appellant for domestic use, and, under the law as it seems to be settled in this country, as the meat turned out to be unwholesome, he was liable, although he was not aware that it was diseased when he sold it to appellant.

"In an ordinary sale of goods, the rule of *caveat emptor* applies, unless the purchaser exacts of the vendor a warranty. Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased. It may be said that the rule is a harsh one; but, as

a general rule, in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale than are possessed by the purchaser, that it is much safer to hold the vendor liable than it would be to compel the purchaser to assume the risk."

Whether the action be called one on warranty or of negligence it comes to the same thing. It sounds in tort. From the dealers, and especially the manufacturer's better means of knowledge arises the implication of a warranty and the attendant presumption of *scienter*. The negligence consists in offering stuff not known to be wholesome for sale, to the purchaser's injury.

It is next contended that the motion for a new trial should have been granted. Four grounds are urged: (1) that the evidence was insufficient to justify the verdict; (2) that certain testimony was erroneously admitted; (3) that certain instructions were erroneously given and certain requested instructions were erroneously refused; (4) that the verdict was excessive.

Respondent's evidence, the salient points of which we have endeavored to set out in our statement of the case, was clearly sufficient to take the case to the jury on the question of the unwholesomeness of the meat and as to whether it was the cause of respondent's sickness. Whether the evidence adduced by appellant was sufficient to overcome that of respondent was a question for the jury. The claim that the fact that parts of the same larger piece of meat from which that purchased by respondent was cut were examined by chemists and no putrefactive or other bacteria found was conclusive of its purity is not tenable. There was no satisfactory evidence that it was not possible that a part of the larger piece of meat might have been infected or infected in a dangerous degree and another part not infected or only slightly infected. It is elementary that it is not the province of this court to weigh the evidence. We cannot say that the trial

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court abused its discretion in denying the motion for a new trial upon the record before us.

What we have said of the motion for judgment *non obstante* disposes of the question of appellant's knowledge. If the jury believed that the meat was in fact unwholesome and caused respondent's sickness, *scienter* is presumed as a matter of law, especially where, as here, the vendor for immediate consumption is not only the dealer but also the manufacturer.

The contention that improper testimony was admitted is based upon the claim that a long hypothetical question propounded to certain physicians included elements not established by other evidence. We have read the question and we have read all of the evidence. We are convinced that the question included no improper elements. That it did not include matters subsequently adduced by appellant in defense was not a fault. Appellant had every opportunity to cross-examine and include such elements.

It is also urged that the court erred in admitting the testimony of two physicians who expressed the opinion that respondent's sickness was caused by eating the meat, because their opinion was based partly upon the history of the case as detailed to them by respondent. It is asserted that this should have been excluded as hearsay. But neither of the physicians repeated what respondent had said. It is obvious that no intelligent examination could have been made nor any intelligent opinion expressed without taking into consideration both the subjective and objective symptoms. The evidence was not objectionable as being hearsay.

The instructions offered and the instructions given are long. We cannot review them in detail. It must suffice to say that we have read them all with much care. Those requested by appellant were largely based upon the theory that the vendor of provisions other than canned goods is not a warrantor of their wholesomeness and that the purchaser for immediate consumption takes *caveat emptor*. The objections

to the instructions given are based upon the same theory. If our view of the law be correct, it is manifest that the requested instructions were properly refused. In so far as the instructions requested correctly stated the law, they were sufficiently covered by the instructions given, which we find correctly covered the law applicable to the evidence.

In support of the claim that the verdict was excessive, appellant mainly relies upon the fact that respondent, up to the time of trial, had lost no great amount of time from his work. But if, as the evidence shows, he has chronic and uncontrollable diarrhea rendering him offensive to his family and friends, and recurrent spasms, and if the jury believed, as there was evidence tending to show, that this condition is permanent and progressive and results from eating the meat, we cannot say that the verdict is excessive. The assessment of damages in such a case is a matter peculiarly within the province of the jury. We find no warrant in the evidence for reducing it.

Two juries have found for respondent on practically the same evidence. We find no error in the record now before us calling for a reversal.

The judgment is affirmed.

MORRIS, C. J., FULLERTON, and CHADWICK, JJ., concur.

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[No. 13384. Department One. September 26, 1916.]

*In the Matter of the PETITION OF MRS. ROSE SNYDER FOR
SUPPORT OF MOTHERS.*¹

CONSTITUTIONAL LAW—CLASS LEGISLATION—MOTHER'S PENSIONS—STATUTES—REPEAL. An abandoned wife, pensioned under the act of 1913 (3 Rem. & Bal. Code, § 8385-1 *et seq.*) cannot object that the act of 1915 (Rem. 1915 Code, § 8385-1 *et seq.*) repealing the former law is unconstitutional as class legislation in that the latter made no provision for abandoned wives; since the earlier act did not provide pensions for all classes of indigent mothers, and is as objectionable in that respect as the act of 1915.

SAME. The act providing pensions for indigent mothers (Rem. 1915 Code, § 8385-1 *et seq.*) is not unconstitutional as class legislation or as denying the equal protection of the laws in that it repeals the act of 1913 authorizing provision for abandoned wives, for whom no provision is made; since the matter is one of public policy only and the pension a voluntary bounty that may be discontinued at any time.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered September 30, 1915, dismissing an application for an allowance under the mothers' pension act, after a hearing before the court. Affirmed.

G. Wright Arnold, for petitioner.

Alfred H. Lundin, Frank P. Helsell, W. F. Meier, and Joseph A. Barto, amici curiae.

FULLERTON, J.—The act of March 24, 1913 (Laws 1913, p. 644; 3 Rem. & Bal. Code, § 8385-1 *et seq.*), commonly known as the Mothers' Pension act, provided for an allowance out of the county treasury to certain destitute mothers whose husbands were dead, or were inmates of penal institutions, or who had been abandoned by their husbands and such abandonment had continued for a period of more than one year. In 1915 (Laws 1915, p. 364; Rem. 1915 Code, § 8385-1 *et seq.*), the act was repealed and a new act passed which pro-

¹Reported in 160 Pac. 12.

vided for allowances only in cases where the husband is dead or confined in a penal institution or insane hospital, or whose husband, through total disability, is unable to support his family; making no provision for a case of abandonment.

While the act of 1913 was in force, the petitioner, Rose Snyder, made application to the proper authorities of King county for an allowance, basing her claim upon the fact that she had been abandoned by her husband, which abandonment had continued for more than one year. Her claim was allowed, and she was paid a fixed allowance until the repeal of the statute by the going into effect of the act of 1915. After that time she applied by petition to the juvenile court for a renewal of the allowance, again basing her claim upon the ground that she had been abandoned by her husband. The petition was disallowed and a judgment rendered dismissing the application. This appeal is prosecuted therefrom.

The appellant attacks the law of 1915 on the ground of constitutionality. She argues that it contravenes § 12 of art. 1 of the state constitution, which provides that no law shall be passed granting to any citizen or class of citizens, or corporations other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens or corporations; and, also, that part of the fourteenth amendment to the constitution of the United States which provides that no state shall make or enforce laws which shall abridge the privileges or immunities of the citizens of the United States or deny to any person within its jurisdiction the equal protection of the laws. The specific objection is that the law makes an arbitrary selection of its beneficiaries, since it includes indigent mothers whose husbands are dead, or incarcerated in penal or insane institutions, or whose husbands are unable because of total disability to support their families, but excludes mothers whose husbands have abandoned them.

In support of the objections, her attorney presents an able brief on the principles to be applied by the courts in deter-

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mining whether or not an act of the legislature falls under the constitutional ban of class legislation. But while we agree with his presentation in the abstract, we cannot think the principles contended for have application here. In the first place, the act of 1918 did not provide pensions for all classes of indigent mothers, and is, in consequence, as susceptible to the constitutional objection of class legislation as is the act of 1915. Any rule of law, therefore, which would destroy the act of 1915 on this ground would destroy all previous legislation on the subject, thus leaving the applicant utterly without remedy in any event.

In the second place, the state may care for its indigent and poor in any manner it pleases. What scheme will be adopted is wholly within the discretion of the legislature. That body may provide, without violating any provision of the constitution, that certain classes shall be cared for by regular allowances from the county treasury, while others may receive intermittent allowances, or be cared for at alms houses or poor farms maintained for the purpose. No individual or class of individuals can acquire a vested right to be cared for in any particular manner. Indeed, the state is under no legal obligation to care for its poor at all. While it undoubtedly has a moral obligation to do so, there is no such obligation as can be enforced in law. Such relief as it does provide is legally in the nature of a largess or bounty, which may be discontinued at the legislative will.

In the case before us, the legislature probably discontinued pensions to indigent mothers whose husbands had abandoned them because it concluded that to grant such pensions was not in accord with sound public policy. But whatever may have been its motive, there is no question as to its right and power to discontinue such pensions, and no former beneficiary can legally complain.

The judgment is affirmed.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

CHADWICK, J. (concurring).—The suggestion that the act of the legislature amending the Mothers' Pension bill violates art. 1, § 12 of the state constitution, and the fourteenth amendment to the constitution of the United States, will not bear discussion. Those sections of our constitutions apply only to rights sounding in contract, or which become vested rights under some rule of the common law or a statute which partakes of the nature of a contract.

"Vested rights never grow out of gratuitous favor. Only those who can ground their claims in some contract, express or implied, or upon some right guaranteed by the common law, are heard to assert such rights. Neither element exists in this case." *Whitaker v. Clausen*, 57 Wash. 268, 106 Pac. 745, 107 Pac. 892.

"No pensioner has a vested right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion." *United States v. Teller*, 107 U. S. 64-68.

"The right of recovery being dependent upon the statute, it is within the power of the legislature to limit the amount of the recovery to any sum it sees fit." *Longfellow v. Seattle*, 76 Wash. 509, 136 Pac. 855.

And we may add—to any person it sees fit, for, as said in *Frisbie v. United States*, 157 U. S. 160-166:

"Congress being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension, . . . The whole control of that matter is within the domain of Congressional power. *United States v. Hall*, 98 U. S. 343."

The supreme court of Illinois refused to give a similar statute the character of a remedial statute, in the absence of clear and apt language, notwithstanding the contention that in construing an act that may have been intended to be retrospective in its application, the courts will resolve the doubt in favor of the individual, resorting to contemporaneous construction if necessary, saying:

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"Appellees argue this case as though it were a matter of contract or vested right, while, in fact, it is a mere matter of largess or bounty. A pension is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a valid law is no reason why that law may not be repealed and the pension cease." *Eddy v. Morgan*, 216 Ill. 437, 449, 75 N. E. 174.

[No. 13432. Department One. September 26, 1916.]

W. A. HASKINS, as Assignee of E. A. Holston for the Benefit
of Creditors, Appellant, v. FIDELITY NATIONAL BANK,
Respondent.¹

FRAUDULENT CONVEYANCES—PREFERENCES—BILL OF SALE—DELIVERY—CHANGE OF POSSESSION. Under a bill of sale by a debtor given as security, there is a sufficient delivery or change of possession of lumber piled in the vendor's yards, as against a subsequent assignee for creditors, where the vendee's agent came to the yard, looked it over with the vendor, who agreed he might take it, and the agent employed a man to take and haul it away.

CHATTEL MORTGAGES—SALES—VALIDITY—RECORDING—CHANGE OF POSSESSION. Where a vendee in a bill of sale given as security takes possession of the property prior to the claims of other creditors, the bill of sale is not invalid because not accompanied by an affidavit of good faith or not properly recorded.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered November 27, 1915, upon findings in favor of the defendant, in an action for conversion, tried to the court. Affirmed.

Stacy & Donley and Peacock & Ludden, for appellant.

Hamblen & Gilbert, for respondent.

MOUNT, J.—This action was brought to recover the value of two hundred and eighty-two thousand feet of lumber al-

¹Reported in 159 Pac. 1198.

leged to have been wrongfully taken by the defendant. At the trial of the case, the court found that the defendant had taken possession of the lumber under a bill of sale by authority of the owner, except a small amount which was not included in the bill of sale. For the value of this small amount, the court allowed the plaintiff a judgment for \$144.56. The plaintiff has appealed from that judgment.

The principal question in the case is whether the defendant took actual possession of the lumber prior to an assignment made by the vendor for the benefit of creditors.

It appears that, on April 12, 1913, E. A. Holston, doing business under the name of Holston Lumber Company, was indebted to the Fidelity National Bank in the sum of \$3,000. On that date Mr. Holston executed a bill of sale for "One million two hundred thousand feet of pine logs decked in mill pond at the company's mill, Boyds, Washington, and all the lumber sawed therefrom and piled in the yards of the company." This bill of sale was filed for record on April 23, 1913, in the auditor's office of Ferry county, where the mill was located. It is conceded that this bill of sale was taken as security for the money then owing by Holston to the bank. At that time Holston was indebted to other persons. Afterwards, in December, 1914, Mr. Phelps, representing the defendant bank, went to the mill of Mr. Holston, and Mr. Holston authorized Mr. Phelps to take possession of certain lumber then in the yard, to sell the same, and credit the amount received upon the note, upon which there was then due about \$1,000. Mr. Phelps thereupon checked up the lumber, and employed a Mr. Wilson to haul the lumber from the mill to Boyds, which was a railroad station. It appears that this station was several miles from the mill, and, on account of the condition of the roads, it was necessary to wait for snow before the lumber could be moved. There is some evidence that a small portion of the lumber was hauled by Mr. Wilson to Boyds during the month of December.

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Thereafter, on the 31st day of December, 1914, Mr. Holston made an assignment of all his property to W. A. Haskins for the benefit of creditors. Mr. Haskins thereupon employed a Mr. Anderson to go up to the mill and care for the property. About the 1st of January, 1915, Mr. Wilson, who had been employed by the bank to move the lumber to Boyds, proceeded to do so, and from that until the 6th, removed the lumber to Boyds, and it was afterwards sold and the proceeds credited upon the note by the bank. This action was thereafter brought to recover the value of the lumber so taken. It is shown that, at the time of the assignment, the assignee was informed that this particular lumber had been sold to the bank.

It is strenuously argued by the appellant that there was no manual delivery of the lumber to the bank prior to the time of the assignment by Mr. Holston to Mr. Haskins for the benefit of creditors, that the evidence shows that Mr. Phelps simply checked over the lumber, and that there was no outward indication of any change of possession from Mr. Holston to the bank. It is no doubt true that there was no outward open possession indicated after Mr. Phelps had left the property. But it was not property of which manual possession could be taken. It was lumber piled in the yards of the mill.

In *Churchill v. Miller*, 90 Wash. 694, 156 Pac. 851, after reviewing a number of cases from this court and other courts, we said:

"§5 Cyc. 311, 312, is cited to the effect that the general rule is that the delivery must consist of an actual and continuous transfer of property. This rule must be applied, however, in view of the character and situation of the property and circumstances. Although such possession as a purchaser can reasonably take must be taken, it is not essential, as against creditors and subsequent purchasers, that there should be in all cases an actual manual delivery or a change of possession at the time of the sale, or immediately; citing

also 5 R. C. L. 397. The rule is stated in 35 Cyc. 312, as follows:

“It has been held that it is sufficient as against creditors and subsequent purchasers if notice of the sale is given to the third person in possession, unless his possession is of such a character that it does not convey any notice to the world of the change of ownership . . .”

We think that rule should apply to this case. There were no liens upon this lumber at the time Mr. Holston agreed the bank might take it. The agent for the bank came, looked over the lumber, and took it. He employed a man to take charge of and haul the lumber to the railway station, some distance away. He took such possession as a purchaser could reasonably take, and, quoting from the rule above stated, “it is not essential, as against creditors and subsequent purchasers, that there should be in all cases an actual manual delivery or a change of possession at the time of the sale, or immediately.” We are satisfied, therefore, that the court properly found that there had been an actual change of possession; and also that the assignee took with notice of the claim of the bank at the time of the assignment.

It is next argued that the value of lumber taken which was not included within the sale or delivery, and which was found by the court to be of the value of \$144.56, should have been found to have been of the value of \$353. There was dispute in the evidence as to the value of this lumber, and it was therefore for the court to find, according to its best judgment, what the value was. After reading the evidence we are not disposed to find a greater value than was found by the trial court.

The appellant also contends that the bill of sale without an affidavit of good faith does not constitute a mortgage. Where the vendee takes possession of the property prior to the time other claims are made thereon, he is entitled thereto, even though his bill of sale or chattel mortgage may be invalid as such because not properly recorded. *Watson v.*

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First National Bank of Clarkston, 82 Wash. 65, 143 Pac. 451.

We find no error in the record, and the judgment is therefore affirmed.

MORRIS, C. J., FULLERTON, and ELLIS, JJ., concur.

[No. 13312. Department One. September 27, 1916.]

SAMUEL GOLDSWORTHY *et al.*, Appellants, v. R. J. OLIVER
et al., Respondents.¹

WITNESSES—COMPETENCY—"TRANSACTION WITH PERSON SINCE DECEASED." In an action by executors for money collected by defendant for the deceased, the defendant's identification of deceased's signature to receipts for money paid by defendant is not within Rem. 1915 Code, § 1211, excluding the testimony of a party in interest in his own behalf as "to any transaction had by him" with the deceased.

SAME. In such a case, the testimony of the defendant as to the existence and loss of a receipt signed by the deceased which was not produced is inadmissible as being testimony of "a transaction had with the deceased," under the statute.

EVIDENCE—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT — "SHOP-BOOK"—"TRANSACTION WITH PERSON SINCE DECEASED." An account book, kept by defendant, a business man, showing only sums paid by him to plaintiff's decedent at various dates, apparently all entered at the same time, and not kept in the ordinary course of defendant's business, is not a "shop-book," and is inadmissible, as it appears on its face to be a self-serving declaration, and an attempt to evade the statute excluding testimony of transactions had with the deceased.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered May 8, 1915, in favor of the defendants, in an action for money received, tried to the court. Reversed.

Thomas Stevenson and Lewis & Legg, for appellants.

F. W. Moore, for respondents.

¹Reported in 160 Pac. 4.

MOUNT, J.—This action was brought by the executors of the estate of Peter Mack, deceased, against R. J. Oliver and wife, to recover \$6,868.50, alleged to be due upon the purchase by the defendants of a promissory note which was owned by Mr. Mack in his lifetime. The answer of the defendants admitted the purchase of the note, but denied that it had not been paid, and alleged payment. The court, upon these issues, proceeded to the trial of the case, and concluded from the evidence submitted that the defendants were indebted to the estate of Peter Mack, deceased, in the sum of \$89.75, and entered a judgment therefor. The plaintiffs have appealed from that judgment.

It appears without dispute that, in November, 1911, Peter Mack held a note for \$10,000, signed by William Bremer and A. G. Benbennick. At that time, several payments had been made upon the note, so that there was then due thereon \$8,468.50. Mr. Mack agreed with Mr. Oliver that, if he would take the note and collect it, he might retain from the amount collected \$500, and whatever costs and expenses he was to in making collection. This was agreed to, and on November 2, 1911, Mr. Mack executed a power of attorney authorizing Mr. Oliver to receive and collect the note. Mr. Oliver thereupon collected the amount due upon the note, viz.: \$8,468.50.

It is not claimed that any of this money was paid to Mr. Mack at that time. But Mr. Oliver, on November 6, deposited in the Citizens' Bank of Bremerton \$100 to the credit of Mr. Mack. From that time on until January 6, 1914, Mr. Oliver made a number of deposits in the bank to the credit of Mr. Mack. These deposits altogether amounted to \$950. Mr. Mack in the meantime drew checks against these deposits. On March 19, 1914, Mr. Mack died, leaving \$55 in the bank to his credit. He left a will, leaving his estate to the plaintiffs herein, who are the executors of his estate.

At the trial, Mr. Oliver, in order to show payment, which was then the only issue in the case, testified that he had made

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these deposits in the bank. He was shown a receipt for \$220 dated January 8, 1912. He testified that he was acquainted with the signature of Mr. Mack, and that Mr. Mack had signed the receipt. He was also shown another receipt dated May 28, 1912, for \$1,650, and identified the signature there-to as the signature of Mr. Mack. He also testified that he had another receipt for \$1,000 dated April 5, 1912, which bore the same signature as the receipts already offered, but that this receipt had been lost. Objections were made to the introduction of the two receipts of January 8 and May 28, 1912, upon the ground that the defendant was incompetent to testify because the receipts involved a transaction between the deceased and the defendant which was prohibited by Rem. 1915 Code, § 1211, to the effect that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, then a party in interest shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, such deceased or insane person.

We are of the opinion that the identification of the signatures to these receipts does not come within the terms of the statute, because such identification is not a transaction with the deceased or statement made by him. Furthermore, even if the identification of these signatures may be held to be a transaction between a deceased person and the witness, other witnesses upon the trial identified the signatures of Mr. Mack. We are satisfied, therefore, that as to the receipt for \$220 and the receipt for \$1,650, the court properly admitted them in evidence.

The receipt for \$1,000 was not produced. The witness testified that this receipt was lost. We are satisfied that the court erred in receiving this evidence. No other person testified to having seen the receipt. The giving of the receipt for \$1,000 to Mr. Oliver by Mr. Mack, if it was so given, was clearly a transaction between these two persons. The re-

ceipt itself, if in existence, would be evidence of the fact that it was given. But we think, in the absence of the receipt, it would not be competent for Mr. Oliver to testify that such a receipt had been given, or was in existence.

This court in *White v. Walker*, 84 Wash. 652, 147 Pac. 409, held, in an action brought to establish a lost deed, that the person to whom the deed was given could not testify that she had received it, because that would be a transaction between such person and the deceased person. For the same reason it is clear that the receipt in this case could not be proven by the person to whom the receipt was given without production of the receipt itself. We are of opinion, therefore, that the court erred in receiving this evidence in regard to the lost receipt.

In order to show further payments, Mr. Oliver produced a book in which he testified he kept the account between himself and Mr. Mack. He testified that the entries made in this book were made about the times therein stated, and that they were correct. This book contained no other account. It shows upon its face that the items therein entered were all made in the same handwriting, in green ink, and apparently all made at the same time. The account begins, according to the statement contained in the book, on June 9, 1911. It extended, upon its face, over dates up to March 2, 1914. It shows upon its face only cash debits against Mr. Mack, and that, between these dates, Mr. Mack had received more than the amount owing from Mr. Oliver by some \$24. This book was received in evidence over the objection of the appellant. In receiving the book in evidence, the trial court was controlled by the rule in *Ah How v. Furth*, 13 Wash. 550, 48 Pac. 639. In that case Ah How, who had been working for the estate of Yesler, deceased, had kept the account of his work, and of moneys received from Mr. Yesler. His account book was received in evidence in that case; and this court held that such book was not within the statute. The account there referred to was kept by Ah How, who apparently had

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no other business than the business of cooking for Mr. Yesler. The account book probably showed the dates on which he labored, and the pay which he had received from Mr. Yesler.

We think that case goes to the limit of the rule, and that the rule ought not to be further extended. In this case the book offered in evidence was kept by a man who was engaged in business in the city of Bremerton. If he was not at the time this transaction occurred, he had been before in the grocery business. He was a man of affairs, was director in the Bank of Bremerton, and was apparently a careful business man.

The book contained one item of credit for \$8,468.50, obtained upon the note. The debits were all cash items varying from \$5 to more than \$1,000. A number of items are for \$100; several are for \$500, and \$400, and \$300. There was no evidence that any of these payments were made by the defendant Oliver, except the book itself.

As we have said, this book does not appear upon its face to be a tradesman's book, kept in the line of business of Mr. Oliver, but is at most a private account, kept by him for moneys advanced to Mr. Mack during his lifetime.

The rule is stated in 17 Cyc. at p. 381, as follows:

"But as a general rule books of account of a party are not admissible in his own favor to prove charges for 'money paid' or 'money lent,' or cash items or dealings between the parties generally, since these charges are not usually such as are made in the ordinary course of business, and since other and better evidence of the transaction usually exists or might reasonably be called for by the party making the advance. This rule has been modified by some of the decisions, however, and it is held that where money charges are made in the banking business, or otherwise as a matter of fact in the ordinary course of business, the accounts will be admissible under the shop-book rule. Moreover, the effect of the decisions in some jurisdictions is to extend the rule permitting proof of the delivery of goods sold and the performance of labor by shop-books so as to include charges of sums of

money not exceeding a certain sum, or small sums not definitely fixed by law.

"To be admissible under the shop-book rule the book must as a general rule contain charges by one party to the action against the other and the entry must be made with the intent to make a charge. Thus books of entries of work done have been held inadmissible where the primary object of the entries was to enable the party to settle with his employees in the work and not to charge the work against the adverse party. So a book of credits and not of charges kept by a purchaser or employer is inadmissible. So a party's books are inadmissible to establish a negative in his favor by showing the absence of affirmative entries."

We think, under this rule, that the book here offered was not admissible because it was clearly not a shopbook. It appears upon its face that it was not a book kept in the ordinary business of Mr. Oliver. It does not appear true upon its face by reason of the fact that it appears to have been drawn up all at one time and not extending over a period of two years. We think it appears upon its face to be a self-serving declaration. There was opportunity here for better evidence of the transactions than the book itself. It appears from the record beyond dispute that Mr. Oliver, as we have seen above, was a man of affairs. He was a business man of ability, accustomed to banks and banking business. He was a director in a bank. Peter Mack, during his lifetime, was a bachelor. He lived in filth. He was intoxicated a great portion of his time. In short, Peter Mack, during the last years of his life, was irresponsible on account of his habits and mode of living. It seems to us incompatible with good business judgment, which we must attribute to Mr. Oliver, that he would advance four and five hundred dollars at a time to Mr. Mack without issuing his check therefor, or without taking a receipt from Mr. Mack. And yet, if this book is admissible in evidence, and may be received, we must conclude that Mr. Oliver advanced as much as \$3,000 to Mr. Mack in that way.

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It is plain from the statute itself that the payment of these different amounts would be transactions between the deceased and Mr. Oliver. He cannot, upon the witness stand, testify that he made these payments. To admit this book in evidence would, in effect, authorize a person before the trial of an action to write a statement upon a paper or in a book, and then by testifying that the statement was correct and the items were entered at the time of the different dates therein, make a book admissible in evidence as a trade-book. In other words, to declare this book, under the circumstances, admissible is to declare an easy mode of avoiding the statute. We are satisfied that the rule in the *Ah How* case should not control this case, and that the admission of this book in evidence was error.

This case is triable here *de novo*. The record is before us. It shows upon its face, and is admitted, that the defendant was to deduct \$500 from the amount collected on the note. He was also to receive \$151.20 in costs of collection. The evidence, besides his own testimony, shows that the defendant deposited in the bank \$950 to the credit of Mr. Mack. The evidence further shows that, at the time the money was collected, Mr. Mack, in the presence of Mr. Moore, agreed that Mr. Oliver should deduct from the amount collected \$900 then owing by Mr. Mack to Mr. Oliver. The record shows that Mr. Mack gave to Mr. Oliver a receipt for \$220 and \$1,650. It was not shown, and is not claimed, that there was any other transaction on which Mr. Oliver was indebted to Mr. Mack. It can, therefore, be presumed that these receipts were given for money advanced from this \$8,468.50 owing by Oliver to Mack.

It was also shown by disinterested witnesses that, during the last sickness of Mr. Mack, and after his death, Mr. Oliver advanced money to pay for articles furnished to Mr. Mack before his death, for doctor bills, etc., and after his death, for funeral expenses, the sum of \$726.50. These added together make a total payment from Mr. Oliver to Mr. Mack of

\$5,097.70. Deducting this from the amount of money Mr. Oliver owed to Mr. Mack upon the note, leaves \$3,370.80. We think it plain from the record here that the plaintiffs are entitled to a judgment against the respondents for that amount.

The judgment is therefore reversed, and the cause remanded with instructions to the superior court to enter a judgment against the defendants for \$3,370.80, with interest from the date the complaint was filed.

MORRIS, C. J., ELLIS, and CHADWICK, JJ., concur.

[No. 13269. Department One. September 28, 1916.]

C. H. HORNBERG, as *C. H. Hornburg Automobile Company*,
Appellant, v. E. O. LARSON *et al.*, *Respondents*.¹

BILLS AND NOTES—VALIDITY—FAILURE OF CONSIDERATION. There is entire failure of consideration for a mortgage note given as part consideration for the price of land, where, by mutual agreement, the sale was rescinded and an assignee of the note was informed of that fact when he took the note and agreed, in its stead, to take the note of the vendor.

SAME. The fact that the vendor simply signed the purchaser's note, which the parties had agreed to redeliver, and delivered it to the assignee, would not deprive the purchasers of the defense of failure of consideration.

SAME—RENUNCIATION—STATUTES—APPLICATION. Rem. 1915 Code, § 3512, providing that the holder of a negotiable instrument must renounce his rights in writing unless the instrument is delivered up has no application to a note for which the consideration failed, to the knowledge of the holder at the time he acquired it.

SAME—ACTION—FAILURE OF CONSIDERATION—ORAL EVIDENCE—ADMISSIBILITY. It is competent to show by oral proofs that the consideration for a note, given for the purchase price of land, had failed, to the knowledge of the holder, by a mutual rescission of the sale.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered June 29, 1915, upon the

¹Reported in 160 Pac. 11.

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verdict of a jury rendered in favor of the defendants, in an action upon a promissory note. Affirmed.

Barker & Barker, for appellant.

Mulligan & Bardsley, for respondents.

MOUNT, J.—This action was brought to recover upon a promissory note for \$1,500, executed by the defendants in favor of one Rice. For answer to the complaint, the defendants admitted executing the note, but alleged that there was a failure of consideration which was known to the plaintiff at the time he acquired the note. There were other affirmative defenses not necessary to mention. Upon these issues the case was tried to the court and a jury, resulting in a verdict and judgment in favor of the defendants. The plaintiff has appealed.

It appears that, on July 26, 1912, the defendants entered into an agreement with John D. Rice to purchase thirteen acres of land belonging to Rice. At that time there was a mortgage against the land for \$1,500. The defendants agreed to purchase Rice's equity for the sum of \$1,500, and to pay for the same by a note secured by a second mortgage upon the land. The note and mortgage were executed and delivered to Mr. Rice. A deed was executed by Mr. Rice to defendants and signed by him, but was not signed by his wife, who at that time was in Oregon. It was agreed between them that Mr. Rice should take the note and mortgage and the deed, have his wife sign the deed, and not file the mortgage for record until after the deed had been signed and delivered by Mr. Rice to the defendants. Thereafter, before the deed was signed, Mr. Rice desired to purchase from the appellant Hornburg an automobile. The transaction between Mr. Rice and the defendants was explained to Mr. Hornburg, and he agreed to take the note and mortgage of \$1,500 in payment for the automobile and to repay Mr. Rice \$300 when the \$1,500 was collected. Thereafter Mr. Rice and these defendants agreed to rescind the sale of the prop-

erty and Mr. Rice informed Mr. Hornburg of that fact, and it was then agreed that Mr. Rice should execute a note and mortgage for \$1,500 upon the real estate direct to Mr. Hornburg in payment of the automobile. It was further agreed that the note and mortgage executed by the defendants should be returned to them. The deed from Mr. Rice to the defendants was never delivered. The mortgage executed by the defendants to Mr. Rice was returned to the defendants, but the note was not returned.

It is claimed by the appellant that there was no evidence, sufficient to go to the jury, of the failure of consideration for the note sued upon. But we are satisfied from a careful reading of the record that the evidence is conclusive to the effect that there was an entire failure of consideration of the note from the defendants Larson and wife to Mr. Rice, and that Hornburg had notice of that fact at the time he took the note sued upon and, in its stead, agreed to take Mr. Rice's note direct secured by a mortgage upon the real estate. Upon the question of failure of consideration of the note sued upon, there was sufficient evidence to go to the jury.

It is argued by the appellant that, because the note bears the signature of Mr. Rice in addition to the signatures of the Larsons, this is evidence that the note itself was not rescinded. The defendants testified that the agreement was that a new note was to be made by Mr. Rice to Mr. Hornburg. Mr. Rice also testifies that a new note was to be made and that it was made, signed by himself personally, and delivered to Mr. Hornburg in payment of the purchase price of the automobile. The appellant argues that Mr. Rice simply signed the note payable to him by the Larsons and delivered that to Mr. Hornburg. Whatever the fact may be with reference thereto, it is plain that Mr. Rice is liable. But the mere fact that Mr. Rice signed the note payable to him by the Larsons and which he and the appellant had agreed should be redelivered to the Larsons, clearly would

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not deprive the Larsons of the defense of failure of consideration in an action to enforce the note against them. The rule is well settled that a failure of consideration avoids a note in the hands of persons who purchase with notice. 3 R. C. L., p. 942 *et seq.*, § 138.

At the trial of the case, the defendants were permitted to testify, over the objection of the plaintiff, that the plaintiff, Hornburg, agreed to return to them the note executed by them to Mr. Rice. Appellant contends that this was error and cites Rem. 1915 Code, § 3512, which provides that the holder of a negotiable instrument may renounce his rights against a party, but that such renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon. That statute applies to valid enforceable instruments. As we have seen above, in this case the note sued upon was not an enforceable instrument, if it was made without consideration, or if the consideration failed and the holder knew of such failure at the time he acquired the note. We think it was competent for the defendants to show by oral proof the facts in regard to the making and delivery of the note in order to show what the consideration was or whether there was a failure of consideration. 3 R. C. L., p. 943, § 139. We think the statute relied upon has no application to this case.

We find no error in the record. The judgment is therefore affirmed.

MORRIS, C. J., CHADWICK, ELLIS, and FULLERTON, JJ.,
concur.

[No. 13416. Department One. September 28, 1916.]

AMERICAN SAVINGS BANK & TRUST COMPANY, *Respondent*, v.

J. E. MUNSON *et al.*, *Appellants*.¹

APPEAL—REVIEW—FINDINGS. Upon directly conflicting evidence the findings of the trial court supported by the only disinterested witness, are entitled to great weight, although not conclusive.

PAYMENT—APPLICATION—COLLATERAL—RIGHTS OF HOLDER. Where insurance policies were held by a bank as collateral to secure the whole indebtedness of the insured, which included a \$5,000 note, a forced payment on the policies of \$6,000 without direction as to its application, may be applied by the bank to any part of the indebtedness, and therefore does not operate as full payment of the note when not so applied.

BANKRUPTCY—COLLATERAL—TITLE OF TRUSTEE—ADJUDICATION OF PRIORITY. The trustee in bankruptcy is vested by law with all title to the assets of the bankrupt, including securities held by the creditor as collateral, especially after being substituted as plaintiff in an action wherein the securities were in suit; hence the bankruptcy court had jurisdiction to determine the validity of the creditor's claim to the collateral.

BANKRUPTCY—DIVIDENDS—CREDITOR HOLDING COLLATERAL—WAIVER—CONSTRUCTION—EVIDENCE TO EXPLAIN WRITING. Where a bank, holding insurance policies of a bankrupt as collateral to secure an indebtedness, refused to indorse drafts given in settlement of the policies until after parties in interest had signed a letter directing the bank to indorse the drafts to the trustee in bankruptcy without incurring obligation or responsibility for so doing, such letter is sufficiently indefinite to admit of parol evidence that the bank's purpose was to turn over the drafts to the trustee without waiving any of its rights against the parties directing such indorsements, and submitting its claim of priority to the fund for adjudication by the bankruptcy court.

SAME—DIVIDENDS—ADJUDICATION OF PRIORITY—PARTIES—PERSONS CONCLUDED. An order of the bankruptcy court declaring a dividend and adjudicating the claim of a bank to priority in a fund collected from insurance companies on policies held by the bank as collateral, is binding upon indorsers who were parties to the settlement with the insurance companies and who had notice of the intention to declare the dividend, and consented to the payment of the policies to the trustee while parties to the bankruptcy proceedings, although

¹Reported in 159 Pac. 1195.

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they voluntarily withdrew their claim in the bankruptcy proceeding prior to the declaration of the dividend; in view of their relation to the whole transaction.

SAME—COSTS—ATTORNEY'S FEES—PRIORITY. The allowance of a \$500 attorney's fee to an attorney for a trustee in bankruptcy for collecting \$6,000 on insurance policies stands in relation to that fund as money paid or expenses incurred in the preservation of the estate, having priority to all other claims save taxes, under § 64 of the bankruptcy act.

SAME—TRUSTEE'S FEES—WAIVER—PARTIES BOUND BY ALLOWANCE. Parties who made no objection to the allowance of fees to a trustee in bankruptcy, when their attorney was present in court at the time the allowance was made, cannot assert that the trustee had agreed with the attorney not to charge any fees.

APPEAL—REVIEW—FINDINGS—NECESSITY. A reversal will not be granted for failure to make specific findings upon every controverted question of fact, where the ultimate facts found were sufficient to sustain the judgment.

Appeal from a judgment of the superior court for King county, Jurey, J., entered November 23, 1915, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

J. W. Russell, for appellants Munson.

Ballinger & Hutson, for appellants Grant.

Farrell, Kane & Stratton, for respondent.

ELLIS, J.—Action for a balance claimed to be due on a promissory note.

Prior to August 19, 1911, the Seattle Table and Manufacturing Company, a corporation, was operating a manufacturing plant in the city of Seattle. Defendants J. R. Grant, J. E. Munson and George M. Wintermute were, so far as the record shows, the only stockholders. Between that date and October 14, 1911, both inclusive, plaintiff discounted for the manufacturing company five notes aggregating \$5,750, two for \$2,000 each, two for \$500 each, and one for \$750. These were all made by the Seattle Table and Manufacturing Company, payable to its own order, and in-

dorsed by it and also by Grant, Wintermute and Munson. All of these notes being due and unpaid, on January 4, 1912, a conference was had between Graham K. Betts, plaintiff's cashier, and Grant, Munson and Wintermute, at which it was agreed that, of this indebtedness, \$5,000 would be carried by the bank as a carrying account, and the balance of \$750 should be paid in thirty days. The two \$2,000 notes and the two \$500 notes were accordingly consolidated and a new note of that date for \$5,000, payable in sixty days, was given. The \$750 note was renewed by a thirty-day note. These notes were also made by the manufacturing company payable to its own order and indorsed by it, Grant, Munson and Wintermute. The \$5,000 note is the note in suit. The \$750 note was not paid at maturity.

The Seattle Table and Manufacturing Company carried nine policies of fire insurance on its plant aggregating \$12,500, issued from April 17 to July 2, 1911, both dates inclusive. When the manufacturing company first began doing business with plaintiff, it deposited these policies with plaintiff, the evidence leaves it in doubt whether as collateral security for the original notes or only for safe-keeping. The policies were all in full force on January 4, 1911. Certain it is that on that date it was agreed between Betts, for the bank, and Wintermute and Munson, for the Seattle Table and Manufacturing Company, that these policies should be held as collateral; but on the question whether as security for the \$5,000 note alone, or for any and all indebtedness of the company to the bank, the evidence presents an irreconcilable conflict. It is conceded that the bank was to have these policies renewed at their respective expirations, with the clause inserted usual in such cases, loss if any payable to the bank as its interest might appear. This the bank did as to all of the policies save one, which was also renewed, but from which the loss if any clause was, by inadvertence, omitted.

About the middle of July, 1912, the plant of the Seattle Table and Manufacturing Company was destroyed by fire.

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Opinion Per ELLIS, J.

The insurance companies all refused to pay the loss. Suits were brought in the superior court of King county in the name of Wintermute, who held a power of attorney to settle the loss, and the Seattle Table and Manufacturing Company, as plaintiffs, to collect all the policies. The loss claimed was \$7,822.72. While these suits were pending, the Seattle Table and Manufacturing Company was put into bankruptcy by its creditors, among them, the bank. L. V. Newcomb, an attorney in the office of Farrell, Kane & Stratton, attorneys for the bank, was appointed receiver in the bankruptcy court and afterwards elected as trustee. He, as trustee, was substituted as plaintiff in the suits on the policies by stipulation. Edward H. Chavelle, who was attorney for Wintermute and the manufacturing company in the original suits, continued to act therein as attorney for the trustee as substituted plaintiff. Later the insurance companies offered \$6,000 in settlement of the nine suits. The trustee and the bank favored acceptance. Wintermute objected. Munson, after a conference with Betts, cashier of the bank, consented to the settlement. Grant's attitude in the matter does not appear. The settlement was made. The payment was by drafts, one made payable to the attorneys for the insurance companies and indorsed to the trustee, three made payable to the trustee, and the other five made payable to the bank and the trustee jointly. Before the bank would indorse these five drafts, Kane, one of the attorneys for the bank, insisted upon a written consent thereto by Grant and Munson. Chavelle, who then held a power of attorney from Grant and Munson to collect for them certain claims in the bankruptcy suit, prepared a letter, took it to them and they both signed it. It was addressed to the bank and read:

"I am advised by Mr. Chavelle today that the drafts drawn by the various insurance companies in settlement of the suits of the Seattle Table and Manufacturing Company against them, have in some instances been made payable jointly to L. V. Newcombe, as trustee in bankruptcy of the Seattle

Table and Manufacturing Company, and American Savings Bank & Trust Company, and I direct you to indorse the drafts that are payable to you jointly with Mr. Newcombe, and relieve you from any obligation or responsibility for so doing."

The letter was returned by Chavelle to the bank. The five drafts were then indorsed by the bank and turned over to the trustee, who collected the nine drafts and turned the whole \$6,000 of proceeds into the general fund in the bankruptcy court.

The bank, prior to this time, had filed claims in the court against the bankrupt estate based upon the \$5,000 note here in suit and all other indebtedness from the bankrupt to the bank, claiming to be a secured creditor on account of the deposit of the insurance policies as collateral. The claims which Chavelle, as attorney for Grant and Munson, had filed against the estate, on objection thereto by the trustee, were disallowed and by him withdrawn with Munson's and Grant's consent on November 4, 1913. On November 7, 1913, an order was made in the bankruptcy court allowing to the bank \$4,000 as a dividend, and on April 4, 1914, another order was made allowing to the bank additional dividends aggregating \$710.28. Of the total \$4,710.28, the bank applied \$861 in payment of the thirty-day note and accrued interest; \$467.62 in payment of insurance premiums advanced by it in renewing the policies and interest; \$211.82 on an overdraft and interest; and the balance, \$3,169.84, on the \$5,000 note here in suit and the interest thereon, leaving a balance of the principal of \$2,662.49 unpaid, for which, with subsequently accruing interest, recovery is sought in this action. There was also allowed, from the \$6,000, to Chavelle an attorney's fee of \$500, and to the trustee \$253 as fees.

This cause was tried to the court without a jury. The court found for plaintiff and entered judgment against defendants for \$2,875.45, and for \$200 attorney's fee. Defendants Munson and Grant appeal.

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Opinion Per ELLIS, J.

It is first contended that the court erred in not holding that the insurance policies were put up as security for the \$5,000 note only. As noted in our statement, the evidence on this point was sharply conflicting. Munson and Wintermute were positive that Betts said the bank would hold the policies as security for the carrying account alone. Betts was equally positive that nothing of the kind was said, and that the rule of the bank to hold such collateral for any indebtedness that might exist was so universal that had any exception been made in this case he would certainly have remembered it. Betts was no longer connected with the respondent bank. He was the most disinterested witness who testified on the subject. The trial court evidently believed him. We cannot say that the evidence preponderates the other way. We are not bound by the views of the trial court but they are entitled to great weight. Moreover, the probabilities are with respondent. It is unquestioned that the carrying account was not to exceed \$5,000. Had the bank not deemed itself secured by the collateral it would hardly have permitted the thirty-day note to run after due and in addition the overdraft to accumulate. We are satisfied that the policies were held as collateral for the full indebtedness.

Appellants' second contention, that the payment by the insurance companies of the \$6,000 operated, as a matter of law, as a payment of the \$5,000 note, necessarily falls with their first claim. Since the insurance was held as collateral to the whole indebtedness, respondent had the right to apply the money received from the insurance on any part of that debt. The payment was not a voluntary payment by appellants with a contemporaneous direction as to its application, nor was there any antecedent contract requiring its application alone to the note in question. The case is the converse of that presented in *Ross-Higgins Co. v. Rook*, 65 Wash. 546, 118 Pac. 744, relied upon by appellants.

Nor do we find merit in the claim that the bank should, in any event, be charged with the full \$6,000 as money coming

into its possession. In the first place, the drafts were so drawn that the bank could not collect the money on any of them. In the second place, the trustee was vested by law with title to all assets of the bankrupt, including securities held by the creditor as collateral. The bank had no right to hold the securities until its debt was paid, nor to sell them or otherwise realize on them independently of the bankruptcy proceedings. The trustee had sole authority to reduce them to money, and the bankruptcy court had sole jurisdiction to determine the bank's claim to priority of payment from the proceeds.

"The trustee is vested by law with the estate, and could by a proper action recover possession of the securities in possession of any one as collateral, subject to any valid lien such person might have on the proceeds of such securities. The vesting of title gives him constructive possession of the property the instant the title passes. Such property is then brought into the bankruptcy court in its entirety, and under its protection, as fully as if actually brought into the visible presence of the court. No other court and no person acting under process can, without permission of the bankruptcy court, interfere with it, and to so interfere is a contempt. The trustee is an officer of the court, and his possession, actual or legal, is the possession of the court." *In re Cobb*, 96 Fed. 821, 823.

At the time these drafts were drawn, the policies were in suit in the name of the trustee as plaintiff with the consent of all parties concerned. They were, in contemplation of law, in the custody of the trustee. The bank had no such possession as to bar the jurisdiction of the bankruptcy court to determine the validity of its claim. *In re Waterloo Organ Co.*, 118 Fed. 904, 906; *In re Porterfield*, 138 Fed. 192.

In the third place, the letter signed by Grant and Munson authorizing the bank to indorse the drafts, in view of the manner in which the drafts were drawn, can only be construed as intended to authorize the bank to turn the drafts over to the trustee. This letter was dictated by Chavelle,

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who, at the time, was not only attorney for the trustee in the suits on the policies, but was then attorney for Grant and Munson in the bankruptcy proceedings. But aside from this, the letter was sufficiently indefinite on its face to admit of parol proof as to its purpose. Such evidence was admitted, and we think properly so. It seems to us overwhelmingly to show that the then understood purpose of all parties was to authorize the bank to indorse and turn over these drafts to the trustee without waiving any of its rights against Grant and Munson as indorsers of the note. In every view of the case, we are clear that the bank was justified in turning these drafts over to the trustee and submitting its claims to the bankruptcy court for adjudication as to its claim of priority in right to the fund.

What we have said sufficiently disposes of the appellants' main contention. But it is urged that the order of the referee in bankruptcy of November 7, 1913, fixing the amount of the dividend on the bank's claim, is not binding on Grant and Munson because three days before they had consented to the disallowance and withdrawal of their own claims. But they had already received notice of the intention of the bankruptcy court to declare dividends while they were in the fullest sense parties to the proceeding (Bankruptcy Act, § 58). If, as appears, they voluntarily withdrew from that proceeding pending the matter in which they now claim to have been most interested, they can hardly be heard to say that they are not bound by the result. It seems to be conceded that, had they been notified of the referee's order so that they might have appeared and appealed from it to the judge of the bankruptcy court, they would be bound by that order. We think they were affected with notice, and their withdrawal on the very eve of the time set for declaring the dividends binds them. There can be no question that the order of the referee was binding upon the bank. The referee had jurisdiction to declare the dividends (Bankruptcy Act, §39a). It was only incumbent upon the bank to establish its priority

right to the \$6,000, as against other creditors, in a tribunal of competent jurisdiction. It was not incumbent upon it to appeal from the referee's decision in order to preserve its rights as against Munson and Grant. The bank objected to the order as made and sought to have the whole sum applied to its claim. There is no claim that the order was procured through fraud or collusion. In view of the relation of appellants to the whole transaction, we are clear that they cannot now question the order.

Moreover, the two principal claims allowed by the referee to others than the bank were properly so allowed in any event. The \$500 attorney's fee allowed to Chavelle was incurred in collecting the fund. It would seem to stand in the same relation to that fund as money paid or expenses incurred in the preservation of the estate, or expenses incurred in recovering property of the bankrupt for the estate which, under the bankruptcy act, § 64, are among the claims prior to all others save taxes.

As to the \$253 fees allowed the trustee, it is claimed that the evidence shows an agreement on Betts' part that if some one from the office of Farrell, Kane & Stratton were appointed trustee he would serve without compensation. It is not claimed that this agreement was ever called to the attention of those attorneys or of the trustee, nor is it claimed that any such agreement was made with either Grant or Munson directly. Chavelle says the agreement was made with him. This was while he was acting as attorney for the Seattle Table and Manufacturing Company and Wintermute in the suits against the insurance companies. There is no competent evidence that he was then attorney for Grant and Munson in any capacity. He was present in court when the referee allowed the trustee fees, and made no objection. As pointed out by the trial court, since Grant and Munson claim only through an agreement made with Chavelle, they ought to be bound by his acquiescence.

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Opinion Per Curiam.

Finally, it is claimed that the judgment should be reversed because the court did not make specific findings upon every controverted question of fact. The court, however, did find the ultimate facts. We are satisfied that the findings are sufficient to sustain the judgment, which, under the evidence, we find no sufficient reason to disturb.

Affirmed.

MORRIS, C. J., CHADWICK, MOUNT, and FULLERTON, JJ.,
concur.

[No. 13337. Department One. September 30, 1916.]

G. W. HAWN, *Respondent*, v. YAKIMA COUNTY, *Appellant*.¹

APPEAL—REVIEW—DISCRETION—NEW TRIAL. The grant of a new trial for insufficiency of the evidence to sustain the verdict will not be disturbed on appeal except for abuse of discretion.

Appeal from an order of the superior court for Yakima county, Preble, J., entered September 8, 1915, granting a new trial after the verdict of a jury rendered in favor of the defendant, in an action in tort. Affirmed.

Harold B. Gilbert and *Sydney Livesey*, for appellant.

H. J. Snively and *I. J. Bounds*, for respondent.

PER CURIAM.—Appeal from an order granting a new trial upon the ground of insufficiency of the evidence to justify the verdict. We have held in an unbroken line of decisions that the discretion to so order is vested in the lower court, and that its judgment when so entered will not be disturbed on appeal unless there is a manifest abuse of such discretion. The record presents no such abuse.

The judgment is affirmed.

¹Reported in 160 Pac. 7.

[No. 13405. Department One. September 30, 1916.]

GEORGE BOUCKAERT *et al.*, Respondents, v. BURWELL &
MORFORD, INCORPORATED, Appellant.¹

FRAUD—ACTION—MEASURE OF DAMAGES. The measure of damages for fraud inducing a trade of plaintiffs' equity in certain lots must be based upon the market value of the plaintiffs' equity in the lots, and not upon the market value of the lots.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 18, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages for fraud. Reversed.

Byers & Byers, for appellant.

E. M. Farmer, for respondents.

MORRIS, C. J.—Appeal from a judgment upon a verdict in favor of the plaintiffs, in an action to recover damages for false representations in a trade of real estate. Respondents authorized appellant, a real estate broker, to dispose of their equity in ten Seattle lots. Under this authority, appellant secured a trade for forty acres of land in Yakima county. Respondents, alleging that they were induced to make the trade through fraudulent representations as to the character and value of the Yakima county land, brought this action against the broker and recovered judgment, from which this appeal is taken.

Several questions are raised by the appeal, but as our conclusion as to one necessitates a new trial, this only will be noted. In instructing the jury as to the measure of damages, the lower court charged that such measure would be the difference between the market value of the Seattle lots and the market value of the forty acres in Yakima county on the day of the trade. This was clearly error. The measure of respondents' damage would be the actual loss sustained by

¹Reported in 160 Pac. 7.

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Syllabus.

them and no more. "Actual damages means a just compensation for the wrong suffered." *Scribner v. Palmer*, 81 Wash. 470; 142 Pac. 1166. The wrong suffered by respondents, if any, was not to be measured by the market value of the Seattle lots, but only by the value of the interest they lost. The appellant alleges that respondents authorized it to sell their equity in the Seattle lots, and the value of such equity is the only loss complained of. The damages suffered, then, would be based upon the value of respondents' equity, since that is all that they lost; not the market value of the entire holding.

For this error the judgment is reversed, and the cause remanded for a new trial.

MOUNT, CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 13289. Department One. October 4, 1916.]

NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*, v.
KING COUNTY, *Appellant*.¹

TAXATION—RAILROAD PROPERTY—OPERATING PROPERTY—REAL ESTATE—STATUTES. Rem. 1915 Code, § 9152, providing that in the making of the assessment of the operating property of railroads, the right of way, tracks, stations and buildings used in operating the railroad shall be assessed as real estate, and the rolling stock and movable property as personal property, is to be construed in connection with Id., § 9142, defining operating property to include right of way, tracks, terminals and other real estate used in operation, and that real estate not adjoining its tracks, stations or terminals and not used in operating the railroad shall be assessed in like manner as like property of individuals; and thereunder real estate used in the operation of the railroad which adjoins its tracks, stations or terminals is to be assessed as operating property.

SAME—RAILROAD PROPERTY—"OPERATING PROPERTY"—CLASSIFICATION—PUBLIC SERVICE COMMISSION—TAX COMMISSIONERS—POWERS—STATUTES. Under the public service commission act, as amended in 1913, Rem. 1915 Code, § 8626-92, authorizing the railroad commission to classify operating and nonoperating property of railroad com-

¹Reported in 160 Pac. 8.

panies, and providing that the findings of the commission shall be conclusive, "excepting with respect to matters of assessment and taxation," and Rem. 1915 Code, § 9142, relating to the duties of the state tax commission, providing that the state tax commissioners shall make an annual assessment of the operating property of all railroad companies and defining operating property as including real estate adjoining its tracks, the railroad commission has power to classify the operating property of railroads and having classified real estate adjoining terminal grounds as operating property, the state tax commission has no authority to reclassify the same as non-operating property because not used in operating that year, so as to authorize its assessment by the county assessor in like manner as the real estate of individuals; since the two acts are to be construed together, and the exception of the amendment of 1913 as to assessments for taxation refers only to the right of the tax commission to fix a different value upon railroad property than that fixed by the public service commission, and not to a reclassification of operating property.

Appeal from a judgment of the superior court for King county, Ralston, J., entered July 1, 1915, upon findings in favor of the plaintiff, in an action to cancel a tax, tried to the court. Affirmed.

Alfred H. Lundin, Robert H. Evans, and S. M. Brackett,
for appellant.

Geo. T. Reid, J. W. Quick, L. B. da Ponte, and C. A. Murray,
for respondent.

MOUNT, J.—This action was brought by the respondent to cancel a tax upon three blocks of Seattle tide lands, which blocks had been assessed by the county assessor for the year 1914 as commercial or nonoperating property of the railway company. Upon a trial of the issues to the lower court, a judgment was entered as prayed for in the complaint. The county has appealed.

It appears that these blocks are adjoining its tracks, stations and terminal grounds, and were purchased and held by the railway company for terminal grounds. They have been occupied by a telegraph line and a side track. By reason of the fact that these blocks were not entirely occupied by the

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Opinion Per MOUNT, J.

railway company for the purposes of side tracks and terminal grounds, the state board of tax commissioners classified the portion of the blocks not occupied by the railway company as commercial property, and they were so assessed. The railway company has paid the taxes upon its operating property and claims that the order of the tax commission classifying these blocks as commercial property is void because the tax commission had no authority to classify these lands as commercial property when they were held for the use of the railway company as operating property, and were so classified by the public service commission. So that the controlling question in the case is whether the state board of tax commissioners is authorized to reclassify railroad property as nonoperating property when this same property has been classified by the public service commission as operating property. The trial court was of the opinion that the board of tax commissioners had no such authority and, therefore, granted the relief prayed for.

In the year 1907, the legislature passed an act providing for the regulation of railroads within the state. Section 5 of that act provided that it should be the duty of the railroad commission, as early as practicable, to

“ascertain the total market value of the line, equipment and property of each railroad operating in this state used for a public convenience within the state. . . . it shall also ascertain whether the expenditures already made in the construction and equipment of each railroad were such as were justified by the then existing conditions and such as might reasonably be expected in the immediate future; it shall also ascertain whether the money expended by each railroad is reasonable for the present needs of the company and for such as may reasonably be expected in the immediate future.” Laws of 1907, ch. 226, p. 545, § 5.

The section then provided that the commission should make findings of fact upon all matters concerning which it was directed to inquire into, and that such findings should be filed. It then provided:

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any proceeding or hearing in which the public and the railroad or express company affected thereby is interested, and such findings, when so introduced, shall be conclusive evidence of the facts stated in such finding or findings as of the date of filing under conditions then existing, and such facts can only be controverted or contradicted by showing a subsequent change in conditions bearing upon the facts therein determined."

Afterwards in the case of *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63 Wash. 535, 116 Pac. 7, this court, in substance, held that a finding of value by the railroad commission was binding upon the tax commission, which had no power to fix any other value upon railroad property for the purposes of taxation. Afterwards, in the year 1911, a new act was passed making the railroad commission the public service commission, with substantially the same powers with reference to railroads that it had under the old act. Laws of 1911, p. 601.

In the year 1913, the legislature amended § 92 of the act to read as follows:

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, *excepting with respect to matters of assessment and taxation*, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, *except as a basis for taxation*, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined." Laws of 1913, p. 662, § 1; Rem. 1915 Code, § 8626-92.

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It is claimed by the appellant that this amendment authorizes the state board of tax commissioners to reclassify railroad property as operating or nonoperating property for purposes of taxation, because of the amendment excepting the conclusiveness of the findings with respect to matters of assessment and taxation.

The duties of the tax commission are found in ch. 78, p. 132, Laws of 1907 (Rem. 1915 Code, § 9141 *et seq.*). This chapter provides that: "The state board of tax commissioners shall make an annual assessment of the operating property of all railroad companies within this state, for the purpose of levying and collecting taxes as hereinafter provided."

Subdivision 3 of § 2 is as follows:

"The term 'property of the railroad company' as used in this act, shall include all franchises, right of way, roadbed, tracks, terminals, rolling-stock equipment, and all other real and personal property of such company, used or employed in the operation of the railroad, or in conducting its business, and shall include all title and interest in such property, as owner, lessee or otherwise. Real estate not adjoining its tracks, stations or terminals, and real estate not used in operating the railroad, is excepted, and shall be assessed in the same manner as like property of individuals." Laws of 1907, p. 132, § 2; Rem. 1915 Code, § 9142.

Section 12 of the same act, p. 139 (Rem. 1915 Code, § 9152), is as follows:

"In making the assessments of the operating property of railroads, and in the apportionment of the values and the taxation thereof, as hereinbefore provided, all land occupied and claimed exclusively as the right of way for railroads, with all the tracks, and substructures and superstructures which support the same, together with all sidetracks, second tracks, turn-outs, stationhouses, depots, roundhouses, machine-shops, or other buildings belonging to the road, used in the operation thereof, without separating the same into land and improvements, shall be assessed and taxed as real property. And the rolling stock and other movable property belonging to any railroad company or corporation shall be con-

sidered personal property and shall be assessed and taxed as such."

This last section was amended in the year 1911, Laws of 1911, ch. 21, p. 62 (Rem. 1915 Code, § 9152), by adding to that section the following:

"Provided, that all of the operating property of street railroads shall be assessed and taxed as personal property."

It is plain that the public service commission was authorized to classify the property of railroads. We find no statute conferring upon the state board of tax commissioners authority to classify railroad property into operating and nonoperating property. So far as the board of tax commissioners is concerned, the statute itself defines the duties of that commission with reference to operating and nonoperating or commercial property of railroads, for it says at subdivision 3 of § 2 (Laws of 1907, ch. 78, p. 132):

"The term 'property of the railroad company' as used in this act, shall include all franchises, right of way, roadbed, tracks, terminals, rolling-stock equipment, and all other real and personal property of such company, used or employed in the operation of the railroad, or in conducting its business, and shall include all title and interest in such property, as owner, lessee or otherwise." Rem. 1915 Code, § 9142.

That is clearly a definition of *operating property* of railroads, which is assessed by the state board of tax commissioners and not by the assessors of the counties. That subdivision continues:

"Real estate not adjoining its tracks, stations or terminals, and real estate not used in operating the railroad, is excepted, and shall be assessed in the same manner as like property of individuals."

Operating property and commercial property of railroads are distinctly defined. The nonoperating or commercial property is defined definitely as property not adjoining tracks, stations or terminals, and not used in operating the railroad.

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Section 12, above quoted, declares that:

"In making the assessments of the operating property of railroads, and in the apportionment of the values and the taxation thereof, as hereinbefore provided, all land occupied and claimed exclusively as the right of way for railroads, with all the tracks, and substructures and superstructures which support the same, together with all sidetracks, second tracks, turn-outs, stationhouses, depots, roundhouses, machine-shops, or other buildings belonging to the road used in the operation thereof, without separating the same into land and improvements, shall be assessed and taxed as real property." Rem. 1915 Code, § 9152.

This section and § 9142 should be read together, and when so read, we think it is plain that, where the real estate is used in the operation of the railroad, and where it adjoins its tracks, stations, or terminals, such property is to be assessed as operating property of the railway company.

It is conceded in this case, as we understand the record, that, prior to the year 1914, these blocks were classified by the public service or railroad commission as operating property of the railway company, and up to that time were assessed as such, and the taxes apportioned to the different counties through which the railroad runs, as required by the statute. *State ex rel. Hellar v. Jackson*, 82 Wash. 351, 144 Pac. 48.

But in that year the tax commission concluded that this property was not used as operating property and, therefore, classified the same as commercial property. We think the amendment of the public service commission act in the year 1913, to the effect that the findings of the public service commission "shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be

conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation," refers only to the right of the tax commission to put a different value upon railroad property than that fixed by the public service commission; and that the amendment intended only to avoid the rule theretofore announced in *State ex rel. Oregon R. & Nav. Co. v. Clausen, supra*. This is plain when we come to consider that, at the same session of the legislature, by ch. 140, Laws of 1918, p. 438 (Rem. 1915 Code, § 9112), the legislature provided that property should be assessed at not to exceed fifty per cent of its true and fair value in money. It was clearly not the intention of the legislature to require railroad property to be assessed at its true value in money, and at the same time to permit other property to be assessed at fifty per cent of its value. In referring to this question in *Northern Pac. R. Co. v. State*, 84 Wash. 510, 147 Pac. 45, we said at page 529:

"The county assessors are not, however, the assessors of railway operating property; that duty being committed by law to the state board of tax commissioners. The statute so providing, we think renders it plain that the assessed valuation is to be placed upon the entire operating property of each railway company as a unit."

Then, after quoting §§ 9141 and 9148 of Rem. & Bal. Code, we said:

"This language of the latter section manifestly refers to operating property, or as termed in the railroad and public service commission laws, 'property used for the public convenience,' and is the same class of property which it was the duty of the railroad commission in 1908 to determine the 'total market value of,' which duty later devolved upon the public service commission. This, we think, is rendered plain by a reading of § 9148, above quoted, in connection with the provisions of the railroad commission law, especially as amended by the public service commission law of 1911 touching the duty of the commission and the effect of its finding of value of such property; . . .

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"In *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 68 Wash. 535, 116 Pac. 7, and *Spokane & I. E. R. Co. v. Spokane County*, 75 Wash. 72, 134 Pac. 688, we held, in effect, that the property to be assessed by the state board of tax commissioners and the property to be valued by the railroad and public service commissions, is the same property. We are prompted to make this observation so that it may be rendered plain that the organized entity consisting of appellant's operating property, so valued for purposes of taxation, did not include any property other than the property of appellant 'used for the public convenience,' and that whatever other property may have been owned by appellant in that year was not valued for taxation by the state board of tax commissioners, but by the county assessors, and was not regarded as entering into or forming part of appellant's operating property."

From the reasoning in that case it seems to follow that the duty of the public service commission was to determine, not only the value, but the property used by the railway company as operating property, and that when the public service commission determines those questions, such determination is binding, except as to value for taxation, until modified by that commission or by the courts.

As we have seen above, there is no express provision in the law authorizing the board of tax commissioners to classify property except for purposes of valuation for taxation. Where it is found by the public service commission that property is used by the railway company as operating property, we think it is the duty of the tax commission to abide by that decision. We have no doubt of the right of the tax commission to value different classes of railroad property. But that is entirely different from classifying property as operating and nonoperating, when that authority is not expressly given to that commission and is expressly given to the public service commission. Operating property is valued or assessed by the state board of tax commissioners. It is assessed as a unit, according to the provisions of §§ 2 and 12 of ch. 78

of the Laws of 1907. The use of the property is, we think, determined by the public service commission. The act of 1907, relating to the duties of the tax commission, and the act of 1911, relating to the public service commission, must be construed with reference to each other in order to be harmonious.

We are satisfied, therefore, that the trial court properly concluded that the state board of tax commissioners had no authority to reclassify railroad property as operating and nonoperating property when the public service commission had done so, but must take it as the public service commission has determined it to be.

The judgment is therefore affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and CHADWICK, JJ.,
CONCUR.

[No. 13577. Department One. October 5, 1916.]

THE STATE OF WASHINGTON, *on the Relation of T. E.*
Getzelman et al., Plaintiff, v. THE SUPERIOR
COURT FOR KING COUNTY, *King Dykeman,*
*Judge, Respondent.*¹

ATTACHMENT—WHEN LIES—"INDEBTEDNESS"—CLAIM FOR DAMAGES. An unliquidated claim for damages for breach of covenant is an "indebtedness" within Rem. 1915 Code, § 648, authorizing a writ of attachment in certain actions upon the filing of an affidavit showing that the defendant is "indebted" to the plaintiff, specifying the amount of such "indebtedness" over and above all just credits and offsets.

SAME—WHEN LIES—CLAIMS FOR DAMAGES—STATUTES. Subdivision 9 of Rem. 1915 Code, § 648, authorizing an attachment in actions for damages arising from the commission of some felony does not limit the causes for which the attachment may be issued in actions for damages; but the attachment may issue under other subdivisions when the debt is alleged to be due and the defendants are non-residents.

¹Reported in 159 Pac. 1193.

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Opinion Per MOUNT, J.

Application filed in the supreme court June 28, 1916, for a writ of prohibition to prevent the superior court for King county, Dykeman, J., from proceeding in a cause. Denied.

Kerr & McCord, for relators.

Warren H. Lewis, for respondent.

MOUNT, J.—This is an application for a writ of prohibition. The petition shows that, some time prior to December, 1915, the relators sold a tract of land in Snohomish county to A. Roe and wife, and executed and delivered a warranty deed to said land for a consideration of \$16,500, of which \$5,500 was paid in cash and deposited to the credit of relators in the National Bank of Commerce of Seattle. The balance of the purchase price was evidenced by promissory notes made by Roe and wife to the relator T. E. Getzelman. One of these notes was for \$5,000 and three for \$2,000 each. The \$5,000 note was secured by a first mortgage on the property deeded by the Getzelmans to Roe. The three notes for \$2,000 each were secured by a second mortgage on the same property. All these notes and mortgages were deposited in the National Bank of Commerce for the use and benefit of the relators. Thereafter Roe and wife conceived that the grantors had breached certain covenants in the deed, and thereupon instituted an action in the superior court of King county claiming damages for a breach of the covenants.

The amended complaint contained three causes of action. The first cause of action, after describing the deed and the covenants therein contained, alleged, in substance, that there was a certain easement upon a part of the premises in favor of an abutting owner to carry drain and waste water across the premises; that the existence of this easement caused damages to the plaintiff in that action in the sum of \$2,000. The second cause of action, after referring to the deed and the covenants therein and the warranty of quiet and peaceable possession, alleged, in substance, that a portion of the land

was in the lawful possession of other parties, and that by reason thereof the plaintiffs were damaged in the sum of \$500. And for a third cause of action, it was alleged that there was an outstanding lease, by reason of which the plaintiffs claimed damages in the sum of \$3,000, amounting in the aggregate for the three causes of action to the sum of \$5,500. After the complaint in that action was filed, the plaintiffs therein, Roe and wife, sued out a writ of attachment. No property was found within this state upon which the writ could be levied, and thereafter a writ of garnishment was issued and served upon the National Bank of Commerce of Seattle, and the bank made answer to the writ of garnishment to the effect that it held the money and notes and mortgages, hereinbefore referred to, in its possession. The relators are not residents of the state of Washington, but are residents of the state of Illinois. A summons and complaint in that action were served upon them personally in the state of Illinois, and no other process has ever been served upon them. The garnishee, the National Bank of Commerce, attacked the procedure upon the ground that the court was without jurisdiction, and an adverse order in that respect was entered against it. An appeal from that order has been taken to this court.

The relators appeared specially in the cause for the sole purpose of attacking the jurisdiction of the court. The trial court held that it had jurisdiction of the subject-matter of the action by reason of the attachment and garnishment, and this application is to prevent the lower court from proceeding in that cause.

It will be observed from what is said above in regard to the action of Roe against the relators that the action is one for damages for breach of warranty of a deed, and it is argued by the relators that, because such damages are entirely uncertain and unliquidated and speculative in their nature, the action will not support the issuance of the writ of attachment under our statute. Our statute, at Rem. 1915 Code, § 647, provides that "the plaintiff at the time of commencing an

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action . . . may have the property of the defendant . . . attached in the manner hereinafter prescribed."

The next section provides:

"The writ of attachment shall be issued by the clerk of the court in which the action is pending; but before any such writ of attachment shall issue, the plaintiff, or someone in his behalf, shall make and file with such clerk an affidavit showing that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all just credits and offsets), and that the attachment is not sought and that the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant, and either,— . . .

"(2) That the defendant is not a resident of this state; or . . .

"(9) That the damages for which the action is brought are for injuries arising from the commission of some felony, or for the seduction of some female." Rem. 1915 Code, § 648.

It is not claimed by the petitioner that the affidavit upon which the attachment was issued was not sufficient, but it is contended that the word "indebtedness" does not cover an action for damages. The word indebtedness, as used in this statute, we think may be applied to an action for damages arising upon a breach of a written contract. In 22 Cyc., at page 75, in defining the term "indebtedness," it is stated:

"It is a word of large meaning, and must be construed in every case in accord with its context. When used in its strict legal significance, the word applies only to a pecuniary obligation arising from a contract, expressed or implied; but given its plainest and most literal signification, it includes every obligation by which one person is bound to pay money, goods, or services to another."

See, also, 1 Wade, Attachments, §§ 12, 13, 14. We are satisfied, therefore, that the affidavit for the writ was sufficient under this statute.

It is also argued by the relators, as we understand them, that, because of the 9th subdivision of § 648 to the effect that the damages for which the action was brought are injuries arising from the commission of some felony, every other cause

of action for damages is excluded. But it is apparent that subdivision 9 does not limit the causes for which the attachment may be issued. It is one of nine independent causes. The writ of attachment in this case was issued because, first, there was a debt alleged to be due, and second, the defendants were nonresidents of this state. Where the debt is alleged to be due and the defendants are nonresidents of the state the attachment may issue. Or it may issue for an injury arising from the commission of a felony, or for an injury for seduction under the provisions of subdivision 9, irrespective of the other subdivisions of that statute. In the case of *Bingham v. Keylor*, 19 Wash. 555, 53 Pac. 729, in referring to this statute, this court said:

"Under this statute we think an attachment may issue in an equitable action equally as well as in an action strictly legal, when the object is to recover money, and the nature of it is such as to enable the plaintiff to specify the amount of the indebtedness."

It is true in this case the separate causes of action are for damages for the alleged breach of a warranty deed. The object of the complaint was clearly to recover money, and the nature of the action was such that the plaintiff could and did specify the amount of the money demanded as an indebtedness.

We are satisfied, therefore, that the trial court has jurisdiction of the subject-matter of the action by reason of the writs of attachment and garnishment. The application for the writ must therefore be denied.

MORRIS, C. J., CHADWICK, ELLIS, and FULLERTON, JJ.,
CONCUR.

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Opinion Per ELLIS, J.

[No. 12958. Department One. October 5, 1916.]

DENNY-RENTON CLAY & COAL COMPANY, *Appellant*, v.NATIONAL SURETY COMPANY *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS — CONTRACTOR'S BOND—RIGHT OF ACTION—FILING CLAIM—TIME—ACCEPTANCE OF WORK—STATUTES. Where, upon the completion of a city contract, the city engineer furnished a certificate of completion, specifying the amount then due and the ten per cent reserve which would fall due thirty days later under the contract, and on the same day the city council ordered that the same be allowed and a warrant drawn for the amount then due, there was an acceptance of the completed work at that time, without regard to a later "final estimate" and order for a warrant for the final reserve payment; hence a claim upon the contractor's bond, filed more than thirty days after completion of the work, is too late, under Rem. & Bal. Code, § 1161, providing that there shall be no action on the bond unless the claim is filed within thirty days from the completion of the contract and acceptance of the work.

APPEAL—REVIEW—PRESUMPTIONS. Error cannot be assumed on the failure to enter personal judgment against a defendant upon an asserted default, where there is nothing in the record to show that he was personally served or that his default was ever entered.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered January 14, 1915, upon findings in favor of the defendants, in an action on contract, tried to the court. Affirmed.

Ballinger, Battle, Hulbert & Shorts and *Reeves, Crollard & Crollard*, for appellant.

Williams & Corbin and *John W. Roberts*, for respondents.

ELLIS, J.—Plaintiff, as a materialman, brought this action upon the bond given by the original contractor under the provisions of Rem. & Bal. Code, Title VIII, ch. 6, § 1159 *et seq.*, as security for labor and materials furnished in the prosecution of a public work.

¹Reported in 160 Pac. 1.

The material facts are not seriously disputed. The contract was let to defendant McNerney by the city of Wenatchee for the improvement of Wenatchee avenue and other streets in that city, on April 24, 1913. Defendant National Surety Company became his surety on the statutory bond, which in form and amount complied with the statute. Plaintiff furnished to the contractor brick blocks which went into the work and for which there is a balance due from the contractor amounting to \$4,489.19. The contract contains provisions as follows:

"Section 1. . . . Said improvements shall be made under the superintendence of the city engineer of said city, and subject to the acceptance and approval of the city council, and the same shall be completed within the time fixed in the annexed specifications, and stipulations under the penalty therein provided. Said party of the second part shall furnish all skill, labor and material required for the complete performance of this contract and shall produce a completed improvement.

"Section 6. That during the time allowed in the contract for the completion of the work and on or about the 10th day of the month following the issuance of the estimate by the city engineer, the city clerk shall deliver to the contractor a warrant in an amount equal to ninety per cent of such estimate, and the balance of said contract price being ten per cent of such estimate, shall be retained for a period of thirty days after the final completion of the improvement, and no improvement shall be deemed completed until the city engineer shall have filed with the city clerk a statement declaring the same to have been completed. But neither said statement nor any acceptance of said work by the city council shall prevent the city from thereafter making claim for uncompleted or defective work if the same is discovered within two years from the completion and acceptance of the work. No payment shall be issued to the contractor in any event for any part of said ten per cent reserve until the city engineer shall certify to the city clerk that the thirty days since the completion of the work have elapsed, and that no uncompleted or defective work has been discovered for which the city makes claim. . . .

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"Section 7. That in case no lien is claimed against said ten per cent so reserved during said thirty days, and no uncompleted or defective work shall have been discovered and reported by the city engineer during said time, then the ten per cent required to be held as a reserve to protect laborers and material men shall, at the expiration of said thirty days, be paid to the contractors in warrants. But in case notice of such liens is given the city during said period, by or on behalf of any person claiming such lien, or in case the city engineer shall report any claim of the city by reason of uncompleted or defective work, then the amount of all liens so claimed shall be reserved by the city until final determination of such lien claims, and the cost of perfecting such uncompleted or defective work shall be retained until such uncompleted or defective work shall have been perfected or arranged to the satisfaction of the city engineer. . . .

"Section 8. That no estimate will be issued after the time allowed in the contract for the completion of the work, except the complete and final estimates."

The specifications provided that the work should be done and fully completed "in accordance with the plans and specifications and to the satisfaction of the city engineer"; that the contractor shall conform to the directions of the city engineer; that if changes be made "the city engineer shall estimate the amount to be allowed therefor and his decision shall be final and conclusive." Many other provisions appear in the specifications as well as in the contract, showing that the fullest authority of supervision and control of the work was vested in the city engineer.

The last piece of brick pavement was laid, grouted with cement and covered with tarpaulin on the afternoon of November 25, 1913. On the same evening the city engineer furnished to the contractor what is designated as the "complete estimate," certifying in terms that the job was then "one hundred per cent completed" and that the contractor was entitled to \$10,041.57. This sum was ninety per cent of the contract price then remaining unpaid. This complete estimate or certificate of completion also conveyed the informa-

tion that a final payment of \$16,856.17 would be due December 23, 1913. This sum, it is admitted, was the ten per cent stipulated in sections 6 and 7 of the contract to be held up by the city for thirty days after completion of the work to meet any defective work or claims for labor or material which might arise during such thirty days. Though the city clerk at first intimated that this was never filed in his office, he afterwards admitted that it was, and that it was the usual and only form of certificate of completion ever filed in any local improvement proceeding in the city. Moreover, the evidence is conclusive that, on the evening of November 25, it was presented to and acted upon by the city council by an order as follows:

"Moved and seconded, that the engineer's estimate of work completed by J. J. McNerney on Wenatchee Avenue, and other streets, amounting to the sum of \$10,041.57, be allowed, and that a warrant be drawn for the amount; carried."

The city engineer testified, in substance, that he then explained to the city council that the work was then completed, but that the ten per cent should be held up for the further period of thirty days.

On December 23, 1913, the city engineer filed his so-called "final estimate," referring to the complete estimate of November 25, 1913, for the details, and showing the same final balance due of \$16,856.17, and stating that warrants should not be issued for that sum until December 25, 1913, when the thirty-day period would expire. The council thereupon made the following order:

"Moved and seconded that the final estimate of work done on Wenatchee Avenue and other streets by contractor McNerney, amounting to the sum of \$16,856.17, be allowed and a warrant drawn for the amount, the surrender of said warrant to J. J. McNerney to be subject to the approval of the city attorney. Carried."

On January 2, 1914, plaintiff filed with the city clerk its claim against the bond. This was within thirty days after

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the filing of the final estimate but more than thirty days after the filing of the complete estimate.

The trial court found in substance that the contract was completed and the work accepted by the city council on November 25, 1913, and that the plaintiff's notice was tardy. A decree was accordingly entered dismissing the action as against Ed. S. Russell and National Surety Company. Plaintiff appeals.

The sole question is this: When was the contract completed and the work accepted by the city council? The statute in force when this bond was given and when the action was tried and judgment rendered, Rem. & Bal. Code, § 1161, provided that no laborer or materialman shall have any right of action on the bond "unless within thirty days from and after the completion of the contract with and acceptance of the work by the board, council," etc., he shall present and file with such board, council, etc., a notice in writing in substantial compliance with the form in the statute prescribed. The statute as amended in 1915 requires acceptance by "affirmative action" of the board or council. Laws of 1915, p. 62, § 2; Rem. 1915 Code, § 1161. The amending act of 1915 provides that the amendments shall be retroactive. We entertain grave doubt as to the constitutionality of this retroactive provision, but in any event the amendments were not the law when the judgment here assailed was rendered, hence cannot affect it.

It will be noted that the statute makes no provision for the holding up of any portion of the contractor's pay for any time after the completion of the contract and acceptance of the work. That provision is found only in the contract. The holding up of the ten per cent, estimated in both the complete estimate and the final estimate, therefore must be referred to the contract, not to the statute. Both the bond and every right which can be asserted under it is referable solely to the statute. There can be no question but that, on November 25, 1913, the date of the engineer's complete certificate, the

work was in fact substantially completed. The evidence shows that nothing further was done except what is called "cleanup work," such as removing unused bricks, removing the tarpaulins and sand from the pavement and removing tools and lumber used in the work. The engineer then certified that the work was completed—"one hundred per cent complete." Upon his finding that it was completed, he based his estimate of the sum then due—ninety per cent of the entire balance of the contract price—and certified this to the council for approval and payment by warrant. In the same certificate he included an estimate of the ten per cent to be held up under the terms of sections 6 and 7 of the contract until "thirty days since the completion of the work has expired." The order of the council, based upon this certificate and estimate, referred to the matter as "work completed." The action of the council in ordering the complete estimate of ninety per cent paid as certified by the engineer was the only action of the council ever taken directly upon this certificate of completion. That action necessarily implied an acceptance of the work as then completed as certified. If affirmative action be held now necessary, we think that this was such an affirmative recognition of the work as completed as to constitute an acceptance. The very fact that the ten per cent was held up for only thirty days after this affirmative action upon the engineer's complete estimate, when interpreted in the light of the contract (to which alone the holding up is referable, since the statute contains no authority for holding up anything for any time), is in itself a recognition by the city council that the contract had been completed thirty days before the final estimate was to be paid.

Even aside from any affirmative action on the part of the city council, this case is controlled by our decision in the case of *Wheeler, Osgood Co. v. Fidelity & Deposit Co.*, 78 Wash. 328, 139 Pac. 53. In that case we held that, because the contract gave the architect control of the work and provided for the payment on the architect's certificate, an ac-

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ceptance by the architect was an acceptance by the board of control, in that the contract itself, by reason of the broad powers which it gave to the architect, made him the board's agent to accept the work. A comparison of the contract there with the contract here convinces us that the powers conferred on the city engineer in this case were fully as broad as those conferred on the architect in that case. In other respects the case here is much stronger on the facts in favor of respondent than was the case in favor of the bondsmen there. In that case, there was no affirmative action of the board on the final estimate of the architect, which was made on December 6, 1912, except to pass the final estimate voucher on December 23; yet we held that the work was accepted on December 6 because on that date the architect had certified completion. In the case now in hand, the city council actually approved the complete estimate of November 25, 1913, which also included the final ten per cent estimate of \$16,856.17, on the same day that it was made. The so-called final estimate, furnished on December 23, was no more than the final estimate voucher involved in the *Wheeler, Osgood Company* case for the percentage which under the contract alone, not under any provision of the statute, had been held up. Clearly, under the contract, the council's order to pay this balance recognized the work as completed thirty days before. Every element of acceptance found in the *Wheeler, Osgood Company* case is found here, with an added element of the affirmative action of the city council approving and paying the ninety per cent estimate based upon the engineer's certificate and advice that the contract was then one hundred per cent completed.

The facts and the law involved in the *Wheeler, Osgood Company* case were passed upon by this court in three cases—in that case, in the case of *Union Iron Works v. Strauser*, 82 Wash. 51, 143 Pac. 446, and in the case of *McGowan Brothers Hardware Co. v. Fidelity & Deposit Co.*, 84 Wash. 470, 147 Pac. 44. In the first two of those cases exhaustive

petitions for rehearing were filed, which, after mature consideration, were denied. The only possible material distinction between the facts of those cases and the facts here is, as we have noted, in favor of respondent here. There is no distinction whatever between the law of those cases and the law of the case here. All arose under the same statute. From a reading of those cases it is too clear for cavil that, on the facts here, either the certificate of completion made by the city engineer on November 25, 1913, was a final acceptance in law which the city could not dispute, or the action of the council on the same evening in passing and paying the ninety per cent complete estimate was such an affirmative action recognizing the work as completed as to meet the express terms of the statute as an acceptance. In either event, as pointed out in the *Wheeler, Osgood Company* case, a legal acceptance binding as between the city and the principal contractor is binding also upon the materialman. The fact that the "cleanup work" was done after the engineer certified that the work was one hundred per cent completed is immaterial. As we said of a similar insignificant item in the *McGowan Brothers Hardware Company* case, "It could not impeach the certificate in the absence of fraud on the architect's part." No fraud or collusion on the part of the city engineer in the present case is claimed. We are clear that the court's finding that the contract was completed and the work accepted by the council on November 25, 1913, is correct under the law and the evidence. This works no hardship upon a reasonably prudent laborer or materialman. He is not required to wait for completion or acceptance of the work. He can file his claim as soon as he finishes furnishing labor or materials. Such has been our liberal construction of the statute since January 8, 1910. *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158; *McLeod v. Russell*, 59 Wash. 676, 110 Pac. 626; *Washington Monumental & Cut Stone Co. v. Murphy*, 81 Wash. 266, 142 Pac. 665.

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Statement of Case.

Appellant argues that, in any event, the court erred in not entering a personal judgment against the contractor, McNerney. It is asserted that he defaulted, but there is nothing in the record to show that he was served personally with summons or that an order of default was ever entered against him. Obviously, unless he was personally served, the court had no jurisdiction to enter a personal judgment against him. In the absence of anything in the record showing that fact, we cannot assume that the court has committed the error complained of.

The judgment is affirmed.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ.,
concur.

[No. 12990. Department Two. October 9, 1916.]

**BARNARD MANUFACTURING COMPANY, *Appellant*, v. RALSTON
MILLING COMPANY *et al.*, *Respondents*.¹**

CORPORATIONS—TRUSTEES—TERMS—PRESUMPTIONS. Under Rem. 1915 Code, § 3679, expressly limiting the term of the first trustees of a corporation to six months, there is no presumption that they hold over after such term.

SAME. Under Rem. 1915 Code, § 3687, providing that all acts of trustees of a corporation shall be binding upon the company until their successors are elected and qualified, they do not hold over as a matter of law, in the absence of any evidence on the subject.

SAME—TRUSTEES—LIABILITY—UNAUTHORIZED BUSINESS—EVIDENCE—PRESUMPTION. In the absence of a showing that a corporation began to do business prior to the expiration of the term of trustees named in its articles, or that they were acting as trustees either when it began to do business or when the transaction occurred, they are not liable for the debts contracted before all the stock was subscribed for.

Appeal from a judgment of the superior court for Adams county, Linn, J., entered May 5, 1915, upon granting a

¹Reported in 160 Pac. 309.

nonsuit, dismissing an action on contract and for equitable relief. Affirmed.

Losey & Newton, for appellant.

Adams & Naef, for respondents.

MAIN, J.—The purpose of this action was to recover a judgment for merchandise sold and delivered, and also for the appointment of a receiver. The defendants, so far as necessary here to refer to them, were Ralston Milling Company, a corporation, and certain individuals who had been named in the articles of incorporation of that company as trustees. The corporation was insolvent, and judgment went against it by default. As to the other defendants, a nonsuit was entered. From the judgment of nonsuit, the plaintiff appeals.

The facts are these: In the articles of incorporation of the Ralston Milling Company, E. H. Herring, V. T. Donnell, and one other were named as the trustees to manage the affairs of the company "up to and including the first day of July, A. D. 1908." This was in accordance with the statute, Rem. 1915 Code, § 3679, which requires that, in the articles of incorporation, the number of trustees and names thereof who shall manage the concerns of the company for a period of time not less than two nor more than six months shall be stated.

The merchandise for which the action was brought was sold and delivered subsequent to January 6, 1909. The capital stock of the corporation named in the articles was \$25,000, divided into 250 shares of the par value of \$100 per share. The corporation began doing business, and continued to do business, with only about one-half of its capital stock subscribed for. The merchandise was sold by the appellant upon credit in reliance upon the assurance of the manager of the corporation that the capital stock had been fully subscribed. On what date the corporation began to do

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business does not appear from the evidence. Neither does the proof show that Donnell and Herring were trustees of the corporation at the time the merchandise for which the action was brought was sold and delivered. The theory of the action was that trustees of a corporation who launch it upon the business world prior to the time when its entire capital stock is subscribed for, as required by the statute, or who permit it to transact business when the capital stock is not fully subscribed for, are estopped at the suit of a creditor, when the corporation is insolvent, to deny that the entire capital stock has been subscribed, and are liable to the extent that the stock was not subscribed.

In this case it cannot be found that Herring and Donnell were trustees, either at the time the corporation began business or when the merchandise in question was sold, unless there is a presumption that they continued as trustees after the expiration of their term as specified in the articles. In the articles, as already indicated, it is stated that the trustees named shall serve up to and including the first day of July, 1908. The articles having specified a definite term, it does not seem that there could be a presumption that the trustees named continued after the time mentioned. The express limitation of the term leaves no room for presumption. This was the holding in *Philadelphia & Reading Coal & Iron Co. v. Hotchkiss*, 82 N. Y. 471. In that case the original certificate of incorporation named the trustees who should serve "for the first year." And the question was whether the trustees so named would be presumed to have continued after the expiration of the time mentioned. It was there said: "The express limitation of the term leaves no room for presumption."

If the trustees mentioned in the articles continued to act as such after the time for which they were named, it is doubtless true that their acts would be binding upon the corporation, and that they would be subject to all the burdens and liabilities of trustees.

Rem. 1915 Code, § 3687, provides, that "all acts of the trustees shall be valid and binding upon the company until their successors are elected and qualified." Construing a statute identical in meaning and almost identical in terms in *Van Amburgh v. Baker*, 81 N. Y. 46, it was held that the trustees of a corporation may act as such until their successors are elected and qualified, and that their acts would be binding upon the company, but that they did not hold over as a matter of law.

Since it is not shown in this case that the corporation began to do business prior to the expiration of the term of the trustees stated in the articles, or that they were acting as trustees, either at the time the corporation began to do business or at the time the transaction giving rise to this suit occurred, the question of their liability is not properly here for determination and, consequently, no opinion will be expressed thereon.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and BAUSMAN, JJ.,
concur.

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Syllabus.

[No. 13119. Department One. October 9, 1916.]

**UNION SECURITIES COMPANY, *Respondent*, v. R. P. SMITH
et al., *Appellants*.¹**

HUSBAND AND WIFE—SEPARATE PROPERTY—ORAL AGREEMENTS AFTER MARRIAGE—VALIDITY. An oral agreement between husband and wife after marriage that property inherited by the wife and whatever she acquired should be hers and go to her children upon her death and that whatever he acquired and his personal earnings should be his and go to his children by a former marriage, continuously acted upon, is valid and makes the property the separate estate of each.

SAME—COMMUNITY OR SEPARATE DEBT—BOND OF HUSBAND. Where a husband purchased corporate stock with his separate estate, and signed a bond as a stockholder for the benefit of the corporation, the bond is not a community debt.

SAME—COMMUNITY PROPERTY—PRESUMPTION—PURCHASE WITH WIFE'S SEPARATE FUNDS—EVIDENCE. Although the purchase price of land was raised by the giving of joint notes and two mortgages by two communities, creating the presumption that the land purchased was the community property of both communities, an undivided one-half thereof will be held the separate property of one of the wives, where her separate property discharged one-half of the obligations and her husband contributed nothing to the purchase.

HUSBAND AND WIFE—COMMUNITY PROPERTY—BOND OF HUSBAND. Where a husband, holding stock as community property, executed a bond to secure the indebtedness of the company, the bond is a community debt.

FRAUDULENT CONVEYANCES—PREFERENCES—DEBT—BONA FIDES—EVIDENCE—SUFFICIENCY. In an action to set aside conveyances by a judgment debtor to his mother as fraudulent as to creditors, upon an issue as to whether the conveyances were a lawful preference on a *bona fide* debt, vague and indefinite testimony as to events recently occurring and which if true could have been easily corroborated by clear and convincing evidence, but were not, is insufficient to overcome positive evidence that the grantor had paid a large portion of the debt by borrowing money at a bank and paid for the land by giving his own check in part payment of the debt to his mother.

SAME—PREFERENCES—FICTITIOUS DEBT—EFFECT. While a debtor may prefer one of his creditors, even with the knowledge that it will hinder other creditors, the debt must be real and not exag-

¹Reported in 160 Pac. 304.

gerated; hence, regardless of the rule that the property transferred must bear a reasonable proportion to the preferred debt, any security for a sum in excess of what is actually due is presumptively fraudulent, and vitiates the transfer as against creditors, not only as to the fictitious part, but *in toto*.

SAME—ACTIONS—SUBJECTING LAND TO JUDGMENT—AMOUNT. In an action to subject property fraudulently transferred to the lien of a judgment, any sum paid by a joint judgment debtor must be credited on the judgment.

Cross-appeals from a judgment of the superior court for Adams county, Linn, J., entered May 8, 1915, in favor of the plaintiff, in an action for equitable relief, tried to the court. Modified on plaintiff's appeal.

Wm. O. Lewis and *V. T. Tustin*, for appellants.

G. E. Lovell, for respondent.

ELLIS, J.—Action to set aside as fraudulent certain deeds and a mortgage of real estate, and to subject all of the property to the lien of a judgment held by plaintiff as assignee of the bank of Lind.

Prior to 1907, R. P. Smith and his son, Warren Smith, with a number of other farmers of Adams county, had become stockholders in the Farmers Warehouse Company of Lind, a cooperative company organized to facilitate the marketing of their grain. In 1907, these two and a number of other stockholders signed a bond guaranteeing the indebtedness of the warehouse company to the bank. On July 23, 1913, the bank brought suit on this bond. Summons was served on that day, and on June 10, 1914, it recovered a joint and several judgment in the sum of \$5,474.74 against all of the signers of the bond.

On August 7, 1913, Warren Smith and wife conveyed to his mother, Janette P. Smith, wife of R. P. Smith, the north half of section 6, in township 16 north, range 35, E. W. M., which is called in the record the "Peasley land." Warren Smith had acquired title to this land in the spring of 1912.

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On the same day, Warren Smith and wife executed to Janette P. Smith a mortgage covering the north half of section 26, in township 17 north, range 34, E. W. M., and the northeast quarter of section 32, in township 17 north, range 35, E. W. M., purporting to secure a debt of \$15,000. This land is known as the "Warren Smith land." The deed was filed for record on June 6, 1914, the mortgage on June 9, 1914. One purpose of this suit was to declare this deed and mortgage fraudulent as to the plaintiff's judgment and to subject the land as belonging to Warren Smith to the judgment against him.

About August 7, 1913, Warren Smith and wife also executed to Janette P. Smith a chattel mortgage on all of their stock, teams and farming implements, purporting to secure a debt of \$5,000. This was satisfied by a bill of sale of this property from Warren Smith and wife to Janette P. Smith, executed June 8, 1914, and recorded June 9, 1914. This transaction is not assailed.

In 1907, R. P. Smith and Warren Smith negotiated the purchase of the northeast quarter of section 4, in township 16 north, range 35, E. W. M., and the southeast quarter of section 32, in township 17 north, range 35, E. W. M., known as the "Cartwright land." Title was taken in the name of Janette P. Smith. The consideration paid was about \$12,000. The money was raised, \$8,000 at a bank on joint notes of Warren Smith and wife, Janette P. Smith and R. P. Smith, \$1,750 by a mortgage given by Warren Smith and wife on their homestead, and \$1,750 by a mortgage given by R. P. Smith and Janette P. Smith on their homestead. All of these obligations were paid in 1908. Plaintiff seeks to have this tract declared community property of R. P. and Janette P. Smith and subjected to the lien of its judgment.

In 1897 and prior thereto, Janette P. Smith acquired title to a half section of land known as the "Railroad land," and another tract of four hundred acres, known as the "Boyles land." Plaintiff sought to subject these, as community

property of R. P. and Janette Smith, to the lien of its judgment. But the only evidence on the subject shows, and it now seems to be conceded, that these two tracts, though acquired after her marriage with R. P. Smith some forty years ago, were paid for with money she inherited from her father before her marriage and are, therefore, Janette P. Smith's separate property.

The court adjudged: (1) that plaintiff's judgment as against R. P. Smith is a lien on the community property of R. P. and Janette Smith; (2) that an undivided one-half of the "Cartwright land" is community property of R. P. and Janette P. Smith, and as such subject to execution to satisfy the judgment; (3) that the mortgage covering the "Warren Smith land" is a valid mortgage; (4) that the "Peasley land" is the separate property of Janette P. Smith and is not subject to the lien of plaintiff's judgment.

Both parties having appealed, we shall designate them throughout as plaintiff and defendants. We shall consider each branch of the judgment separately.

I. Both R. P. and Janette P. Smith testified that, during all of their married life, they have conducted their business separately; that, at the time of the marriage, she had a considerable amount of property inherited from her father; that, at or about that time, it was agreed between them that whatever she acquired should be hers and upon her death should go to her children, and that whatever he acquired and his personal earnings should be his and upon his death should go to his two children by a former marriage. Three disinterested witnesses who had known the Smiths for many years and had transacted business with both of them testified that they had always conducted their business separately. Their sons, Warren Smith and Newell Smith, the former thirty-eight years old, the latter twenty-nine, testified that such had been the case as long as they could remember. This evidence fairly establishes the agreement and shows that, in the main, it had been continuously acted upon. Though this

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was an oral agreement, it does not appear that it was made before the marriage. It is not assailed as a contract made upon consideration of marriage, hence void because verbal, as we held in *Koontz v. Koontz*, 88 Wash. 180, 145 Pac. 201. The statute of frauds is neither pleaded nor discussed. Such agreements, made after marriage and mutually observed, are valid. *Gage v. Gage*, 78 Wash. 262, 138 Pac. 886; *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088; *Yake v. Pugh*, 13 Wash. 78, 42 Pac. 528, 52 Am. St. 17.

R. P. Smith testified that he purchased the stock of the warehouse company, ten shares of \$10 each par value, with money earned by himself, that his wife was in no manner concerned in the purchase, and that he signed the bond as a stockholder. We are clear that his signing the bond did not create a community obligation. *Way v. Lyric Theater Co.*, 79 Wash. 275, 140 Pac. 320. The court erred in holding the judgment a lien on the community property of R. P. and Janette P. Smith.

II. The giving of the joint notes of the two communities and the two mortgages to raise the original purchase price of the Cartwright land strongly supports the view that an undivided one-half of this land belonged to each of the communities composed of R. P. Smith and Janette P. Smith and Warren Smith and wife. All of these parties, however, testified that the title was taken in the name of Janette P. Smith because the land was purchased for her, and that she paid off all of these obligations from her own funds. But it fairly appears that the money came partly from the crops growing upon the land when it was purchased, partly from money in bank in Warren Smith's name, and about \$2,500 from money inherited from her father by Janette P. Smith. It also appears that Warren Smith for many years had rented his mother's lands for half the crops after deducting seed and feed, and that when from time to time these crops were disposed of, the proceeds, both of his part and hers, were deposited in the bank to his credit. There was no evidence that

R. P. Smith contributed anything toward discharging the obligations created on the purchase of this land. On the whole, we are satisfied that an undivided one-half of this land is the property of the community composed of Warren Smith and wife, and the other half the separate property of Janette P. Smith, and we so hold. There can be no question that plaintiff's judgment as against Warren Smith binds the community property of Warren Smith and wife. It is therefore a lien on their undivided one-half of this land.

III. For convenience in consecutive discussion, we shall next consider the "Peasley land." This land was purchased for \$12,000 at an administrator's sale in the spring of 1912. We are satisfied that it was purchased by Warren Smith for Janette P. Smith; that, through mistake, the return of sale was made in his name and that soon afterwards he attempted to have the mistake corrected, but was told that the easiest way to correct it was to deed the land to her, his wife joining. Both he and Janette P. Smith so testified, as did also two attorneys whose advice they took at the time. There is no evidence to the contrary. Warren Smith had been farming Janette P. Smith's lands during the years 1908 to 1911, inclusive, but had paid her no rent since 1907. He borrowed money at a bank and paid for this land, giving his own check for something over \$8,000 of the purchase price and turning over two certificates of deposit aggregating about \$1,700, belonging to his mother. So far as can be gathered from the evidence, the balance of the purchase price, consisting of a mortgage assumed on the purchase, was paid partly by crops then growing on the land and partly by Warren from rent money owing by him to her. While the evidence is much confused, we are convinced that Warren paid at least \$9,000 of the purchase price of this land in part payment of his debt to his mother. True, she testified to the effect that at about this time, she does not remember whether before or after the Peasley purchase, she received a draft for \$10,000 from a niece in Michigan who has since died; that she cashed-

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this draft at some bank in Spokane, but could not remember what bank or where in the city it was located; that she was identified by a "Dutch" woman named "Ella" or "Lena," she is not certain which, who at one time worked for her; that this woman now lives on "some avenue" in Spokane, but she cannot remember where; that she received the money in bills, spent some of it and brought \$9,500 home with her in her pocket and gave it to Warren Smith with which to pay for the Peasley land; that this money she inherited from her mother and had been owing to her from her niece thirty-two or thirty-three years. But this is all too vague and indefinite to carry conviction. It must be remembered that all this is supposed to have happened less than three years prior to the time when she testified and is of such nature as to be remembered with certainty and exactness, and that since then she had a settlement with Warren Smith in which it must have been discussed. Moreover, every item of this testimony is of such nature as to be easily corroborated and rendered certain in many ways which at once suggest themselves. On the other hand, certain it is that Warren Smith did not pay for the Peasley land with this money, and certain it is that his bank account shows no such deposit, or any unusual deposit at or near this time. Though he testified that she gave him cash from time to time, he could not remember when nor the amount, and "supposed" he kept some of it around the ranch and put some in the bank. When asked if she gave him \$9,500 in cash at any time, he said: "I don't remember. Those things pass on in the common ways of daily life, and I don't remember." Clear and convincing proof of these things lay easily within their power. The evidence adduced seems to us too vague and doubtful to furnish the basis for a legal right. We find that she owns the Peasley land as her separate property, but that at least \$9,000 of the purchase price was paid by Warren Smith and should be credited upon his debt to her.

IV. The evidence as to the settlement between Janette P. and Warren Smith as the basis of the mortgages is also lamentably vague and indefinite. Both of them testified, in substance, that they discussed their business matters and concluded that he owed her, for rents and borrowed money, over \$20,000. When the loans were made and what their amount, neither could tell. What the amount of grain raised by him on her lands during the five years for which it is claimed she had received nothing, neither could tell. He could not remember whether he had been served with summons in the Bank of Lind suit when the mortgages were given or not, but the evidence shows that he had in fact been served just fourteen days before. She could not remember whether at that time she knew of that suit, but admitted that she knew "a storm was brewing." The attorney in whose office the settlement was made and who witnessed the mortgage and the deed to her of the Peasley land, though he testified as to other matters, did not testify as to this settlement. Two things, however, are reasonably certain. Of this \$20,000 debt, \$5,000 was paid by the bill of sale of the stock and implements covered by the chattel mortgage, and the \$9,500 which Mrs. Smith claims to have given to Warren Smith about the time of the Peasley purchase was included in the \$15,000 secured by the real estate mortgage. But the proof, as we have seen, was wholly insufficient to show that she ever turned over to him this \$9,500.

Defendants assert that this mortgage was a valid preference. It is settled law in this state that a debtor, though insolvent, may prefer one or more of his *bona fide* creditors even if it exhaust his whole property to do so. *McAvoy v. Jennings*, 44 Wash. 79, 87 Pac. 53; *Vietor v. Glover*, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297. Mere knowledge on the preferred creditor's part that his preference will hinder or defeat other creditors will not alone render his preference fraudulent. *Holt Mfg. Co. v. Bennington*, 73 Wash. 467, 132 Pac. 30. But the preferred debt must be

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real. It must not be used as a colorable consideration to shield the debtor's property from other claims. *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347; Bump, *Fraudulent Conveyances* (4th ed.), § 172.

"The law looks with great jealousy upon the manner of giving preferences, and denounces all departures from good faith, and requires that the parties shall not secure any covert advantage to the debtor in prejudice of his creditors." Bump, *Fraudulent Conveyances* (4th ed.), § 174.

Though it is usually held that the property transferred must bear a reasonable proportion to the preferred debt (Bump, *Fraudulent Conveyances*, § 174), excessive security by mortgage raises no conclusive presumption of fraud. It is evidence to be considered with other circumstances in determining fraud. *Grand Island Banking Co. v. Costello*, 45 Neb. 119, 63 N. W. 376. But there is an obvious and marked distinction between an excessive *security* and an exaggerated *debt*. Any security for a sum known to be in excess of what is actually due is presumptively fraudulent. *Kellogg v. Clyne*, 54 Fed. 696; *State ex rel. Redmon v. Durant*, 53 Mo. App. 493. This results as a corollary from the universal rule that the preferred debt must be real to furnish the essential element of good faith.

There are some authorities which hold that such a mortgage is only void as to the fictitious part of the ostensible debt, but the better rule is the other way. If a creditor knowingly takes a mortgage for more than his due, the fraud corrupts the whole. Bump, *Fraudulent Conveyances* (4th ed.), §§ 485, 486, 487; *Holt v. Creamer*, 34 N. J. Eq. 181; *Heintze v. Bentley*, 34 N. J. Eq. 562; *Whiting v. Johnson*, 11 Serg. & Rawle 328, 14 Am. Dec. 633; *Hall, Moses & Roberts v. Heydon*, 41 Ala. 242; *Russell v. Winne*, 37 N. Y. 591, 97 Am. Dec. 755. When plaintiff showed by the parties to this mortgage that it must have included this \$9,500, and brought out circumstances casting the gravest doubt on the existence of so much of the ostensible debt secured, which

doubt if unfounded, in the very nature of the case, defendants easily could have dispelled, but did not, they made their case as against this mortgage. We have no option but to hold it void *in toto* as to plaintiff's judgment. The Warren Smith land is subject to the lien of that judgment.

But the trial court overlooked the fact that plaintiff's assignor had released the lien of this judgment on certain lands of one Offut, another of the judgment debtors, in consideration of an acknowledged payment of \$1,250. We can conceive of no reason why this sum, however it was paid, should not be credited on the judgment, and no reason has been suggested.

Cause remanded for modification of the judgment in accordance herewith. Plaintiff may recover its costs on this appeal.

MORRIS, C. J., MOUNT, and BAUSMAN, JJ., concur.

[No. 13282. Department Two. October 9, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. A. E. HANKINS,
Appellant.¹

APPEAL—RECORD—STATEMENT OF FACTS—CERTIFICATE—SUFFICIENCY. Where the statement of facts is incomplete and does not contain all the material facts and is certified to omit the testimony of a number of witnesses, and appellant, on motion, refused to correct it, a motion to strike is well taken; as the burden is upon appellant to furnish a statement certified to contain all the material facts, or all which the parties have agreed to be all that are material, under Rem. 1915 Code, § 391.

APPEAL—RECORD—EVIDENCE—NECESSITY. Error cannot be predicated on refusing a requested instruction when the testimony of the witness on which it was based is not brought up in the record.

TRIAL—INSTRUCTIONS—RECITALS OF EVIDENCE. It is not error, in giving the legal principles submitted in a requested instruction, to omit the recitals of evidence prefacing the same.

¹Reported in 160 Pac. 307.

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Appeal from a judgment of the superior court for Ferry county, Pendergast, J., entered June 10, 1915, upon a trial and conviction of manslaughter. Affirmed.

G. V. Alexander and Chas. P. Bennett, for appellant.

LeRoy McCann and James T. Johnson, for respondent.

HOLCOMB, J.—Appellant, prosecuted for murder, was convicted of manslaughter, denied a new trial, and sentenced. He urges as grounds of reversal the refusal of two prayers for instructions and the consequent alleged error in denying a new trial.

The statement of facts is incomplete, does not contain "all the material facts" nor "all the facts agreed to be material by the parties," and is certified by the trial judge to omit the entire testimony of a number of witnesses who testified, and the cross-examination of those witnesses who did testify, including that of the defendant himself, whose direct testimony is incorporated therein.

No amendments were proposed by respondent, but timely motion was made to require appellant to correct his proposed statement by including the omitted cross-examination of the witnesses who testified and the testimony of the other witnesses which was omitted; and an alternative motion to strike the proposed statement for such omissions. No attention was paid to these motions by appellant, and, so far as the record discloses, no action was taken thereon by the trial court.

Upon this state of the record, respondent makes several motions, to strike from the statement and the transcript, to strike the certificate, and to strike the entire statement and affirm the judgment.

We feel that the last motion, to strike the entire statement and affirm, is well taken. We have said that "the burden is on the appellant to furnish a statement of the testimony sufficient to show this court the facts upon which the assignments of error are predicated and to give this court a full

understanding of the case. The burden cannot be shifted to the respondent by filing an incomplete narrative." *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859. Also, *State ex rel. Fowler v. Steiner*, 51 Wash. 239, 98 Pac. 609; *State ex rel. Roberts v. Clifford*, 55 Wash. 440, 104 Pac. 631; *Taylor v. Andres*, 83 Wash. 684, 145 Pac. 991.

There may be two forms of certificate to a statement of facts:

(1) It may certify that the record contains "all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record;"

(2) It may be certified as containing all the facts, matters and proceedings occurring upon the trial which "the parties have agreed to be all that are material" to the hearing on appeal. Rem. 1915 Code, § 391.

The certificate before us does neither, and there was no agreement of the parties that the statement contained all the facts, matters and proceedings occurring upon the trial which were material. No attempt was made by appellant to furnish a complete statement containing all the material facts, matters and proceedings occurring upon the trial, or to compel one.

We have consistently held, from *Kirby v. Collins*, 6 Wash. 297, 32 Pac. 1060, to *State ex rel. Müller v. Seattle*, 45 Wash. 691, 89 Pac. 152, that, upon such condition of the record, the statement should be stricken. As in the last cited case, by the certificate in this case "we are advised . . . that all the material facts which were before the trial court and which controlled its action are not before us."

Assuming, however, that the statement contains all the facts which appellant supposed were and are material to the question of the propriety and correctness of the requested instructions, and because of the gravity of the case and its importance to appellant, an aged man, we have carefully looked into the record. We are first confronted with the fact that the testimony of the appellant himself upon cross-exami-

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nation is not produced. We are unable to ascertain what admissions upon cross-examination he may have made which nullified his testimony on direct examination on the basis of which requested instruction No. 4 was asked. The court did, however, without setting forth specifically the theory of appellant upon which that requested instruction—summarizing his contention—was based, instruct the jury as to the abstract principle of law that, "Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, with ordinary caution and without any unlawful intent;" and that, "Homicide by misadventure is the accidental killing of another when the slayer is doing a lawful act unaccompanied by any criminal carelessness or reckless conduct," etc.; and that if "defendant would justify the act or excuse it, the burden was upon the accused, unless the proof on the part of the state sufficiently manifests that the accused was justified or excused in committing it." The jury were very fully, comprehensively, fairly, and lucidly instructed upon each and every issue and phase of the case usually necessary in such a prosecution or made appropriate by the particular issues and contentions in the case.

The seventh instruction was given, so far as the legal principles submitted were concerned, omitting only the recital of evidence on behalf of appellant prefacing the same. Recitals of evidence in instructions are generally unnecessary and seldom proper, although not necessarily erroneous because thereof. Instructions should clearly state the law, as this one did, and not ordinarily recite facts or evidence.

We have thus discussed the matters complained of by appellant to demonstrate not only our solicitude for the assurance of a fair trial to the appellant in a prosecution of such grave consequence to him, but to show that, in our opinion, it would probably be our duty to affirm the verdict and judgment upon the complete record; but certainly, in any event, upon the imperfect record brought to us, we cannot do otherwise.

As the record stands, the statement must be stricken and the judgment affirmed.

MORRIS, C. J., BAUSMAN, MAIN, and PARKER, JJ., concur.

[No. 13287. *En Banc*. October 9, 1916.]

PUGET MILL COMPANY *et al.*, Plaintiffs, v. THE STATE OF
WASHINGTON *et al.*, Defendants.¹

NAVIGABLE WATERS—SHORE LANDS—STATE DEED—TITLE—OUTER BOUNDARY—EXTENSION. An authorized state deed of second-class tide lands vests in the grantees an absolute fee-simple title; and where the outer boundary is undefined except as defined by law as the line of navigability, the grantees take title to such line as it then existed or as it might be moved further out by any act of the state lowering the waters.

SAME—STATE DEED—RESERVATIONS—VALIDITY—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT. Such title cannot be impaired by any act of the state after making the deeds upon which the title rests; hence attempted reservations to public use designated upon the state's plats above the harbor lines established, except extensions of existing streets running transversely to the shore line, are void.

SAME—SHORE LANDS—STATE DEED—OUTER BOUNDARY—ESTABLISHMENT OF HARBOR AREA. The conveyance of second-class tide lands to private individuals before the establishment of harbor lines in front thereof, is subject to the power of the state to thereafter establish such harbor lines, leaving the outer boundary of the shore land subject to the establishment of harbor lines.

SAME—SHORE LANDS—ESTABLISHMENT OF HARBOR AREA—COMMISSION—POWERS—STATUTES. Where harbor lines in front of second-class tide lands are platted by the commissioner of public lands, pursuant to Rem. 1915 Code, § 8173-2, authorizing him to select and plat the same, and the harbor line commission joined therein by entering its formal order establishing the harbor lines designated on the plats, there was a lawful establishment thereof, notwithstanding article 15 of the constitution, in connection with Rem. 1915 Code, § 6744, seems to contemplate the establishment of harbor lines, within specified limits (not including second-class tide lands) by a

¹Reported in 160 Pac. 310.

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"commission"; as the duty and power prescribed does not constitute a limitation of power upon the legislature touching harbor lines in front of second-class tide lands.

SAME—SHORE LANDS—OUTER BOUNDARY—EXTENSIONS—STREETS—RIGHT TO EXTEND. Where the state's grantees of shore lands became entitled, upon the lowering of the waters by an act of the state, to added shore lands to the line of navigability, the state and municipal authorities representing the public become entitled, on the same principle, to claim the added shore line which is in front of and abutting upon the end of existing streets running transversely and substantially at right angles to the shore line.

SAME—SHORE LINES—HARBOR AREA—SLIPS AND WHARVES—TITLE OF STATE. Upon quieting the title of the state to designated sites for slips and wharves shown on the plat of the harbor area, the title should be quieted only in such slips and wharves and portions thereof as are within the designated harbor areas, and not above the harbor areas.

SAME—SHORE LANDS—ESTABLISHMENT OF OUTER BOUNDARY—"PIERHEAD LINES." In platting harbor areas, the designation of a "pierhead" line alone, upon the state plat, is not the establishing of harbor lines or harbor areas and does not fix the inner harbor line which when established fixes the shore land boundary.

SAME—SHORE LANDS—ESTABLISHMENT OF OUTER BOUNDARY—POWER OF STATE. The state has power to determine, by the establishment of harbor lines, the line of navigability or outer boundary of shore lands dividing harbor area from second-class tide lands sold to private individuals.

Cross-appeals from a judgment of the superior court for King county, Frater, J., entered July 19, 1915, upon findings in favor of the plaintiffs, in consolidated actions to quiet title, tried to the court. Modified on defendants' appeal.

Oldham & Goodale, Farrell, Kane & Stratton, Walter B. Beals, and Hughes, McMicken, Dovell & Ramsey, for plaintiffs.

The Attorney General and R. E. Campbell, Assistant; France & Helsell, James E. Bradford, Howard Hanson, Alfred H. Lundin, Hugh M. Caldwell, and Robert H. Evans, for defendants.

PARKER, J.—This controversy originated in the commencement of four separate actions in the superior court for King county, which, because of the common interest of the numerous parties in the controlling questions presented, were consolidated, tried and disposed of together in the superior court. The plaintiffs seek a decree quieting their titles to certain lands which they claim as second-class shore lands bordering upon the waters of Lake Washington, as against the claims of the defendants, the state of Washington, city of Seattle, Port District of Seattle, and King county. The superior court granted relief by rendering its decree quieting title in the plaintiffs as prayed for by them, except as to harbor areas established by the state commissioner of public lands and the state harbor line commission and the extensions of streets and roads over the shore land running transversely to the shore line, all as designated upon the state's plats made after the plaintiffs acquired their titles from the state as here claimed by them. The defendants have appealed from the decree in so far as it denies their claims for public use to sites for slips and wharves and roads, streets, boulevards and parkways running longitudinally to the shore line, as designated upon the state's plats. The plaintiffs have also appealed from the decree in so far as it denies their claims to the areas within streets and roads running transversely to the shore line as extensions of existing streets and to the harbor areas, as designated upon the state's plats.

The plaintiffs' claims of title are rested upon deeds of the state made to them or their predecessors in interest, describing the land conveyed as "all shore lands of the second class owned by the state of Washington situated in front of, adjacent to or abutting upon those portions of the United States government meander line lying in front of the following described upland, to wit, . . . to have and to hold said premises with their appurtenances unto the said . . ., successors and assigns forever," leaving the outer boundaries of the lands so conveyed undefined in so far as specific

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terms of the deeds are concerned, this being the form of description used by the state in conveying shore lands of the second class, and as authorized by law. These deeds were made by the state in the year 1904. They were all made for a money consideration in pursuance of lawful sale of the lands to the plaintiffs or their predecessors in interest and, as will be noticed, are absolute in form, in so far as the nature of the titles conveyed is concerned. At the time of their execution, the state had not platted any of the shore lands so conveyed, nor had it established any harbor lines or harbor areas in front thereof.

In the year 1914, after the state and national governments had by their action rendered it certain that the Lake Washington canal project would be consummated, resulting in the lowering of the waters of the lake, the state commissioner of public lands caused to be platted the shore lands of the lake, including the lands here involved, designating upon the plats inner and outer harbor lines with harbor areas between in front of portions of the shore lands, and pierhead lines only in front of other portions of the shore lands; and also designating upon the plats above the harbor areas and pierhead lines certain areas or tracts purporting to be reserved and dedicated to public use as sites for slips and wharves and also streets, roads, boulevards and parkways running both longitudinally and transversely to the shore line, some of which transverse roads and streets appear as extensions of roads and streets already established over the original shore lands to the added shore lands. This platting was acquiesced in by the state harbor line commission, which commission, by an order duly made of record, adopted and established the harbor lines and harbor areas as designated upon the plats. In the platting of these shore lands and the establishing of the harbor lines, harbor areas and pierhead lines, the commissioner of public lands and the harbor line commission did so with reference to the shore line and the line of navigability as changed by the lowering of

the waters of the lake in the consummation of the Lake Washington canal project, so that the harbor lines and pierhead lines are located farther out than they would have been had there been no lowering of the waters of the lake. We shall assume, as we proceed, that all of the reservations to public use of tracts and areas as designated upon the plats made by the commissioner of public lands and the harbor line commission, here involved, are from lands which are outside of the shore lands as they existed at the time of the execution of the state's deeds upon which the plaintiffs' rights are rested, before the lowering of the waters of the lake in the prosecution of the Lake Washington canal project.

The problem here presented, so far as the nature of plaintiffs' titles is concerned, is, in substance, the same as that involved in the case of *State v. Sturtevant*, 76 Wash. 158, 135 Pac. 1035, 138 Pac. 650, in the decision of which case we held that the outer boundaries of the granted shore lands had been extended by the lowering of the lake to include the added shore lands, and that the grantees acquired title thereto as if such added shore lands had been then in existence and included in the original grant. This was held to be the law of the state's grantees' shore lands rights in the absence of statute touching the question at the time of the grant, though the state did by statute thereafter so recognize the shore land grantees' titles, attempting, however, to reserve to itself the right to make reservations from the added shore lands for public use in addition to the exercise of its power to establish harbor lines. This was done by the Laws of 1913, ch. 183, page 667, as follows:

"Sec. 1. In every case where the state of Washington has heretofore sold to any purchaser from the state any second class shore lands bordering upon navigable waters of this state by description wherein the water boundary of the land so purchased is not defined, such water boundary shall be held and is hereby declared to be the line of ordinary navigation in such water; and whenever such waters have heretofore been or shall hereafter be lowered by any action done

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or authorized either by the state of Washington or the United States such water boundary shall thereafter be held and is hereby declared to be the line of ordinary navigation as the same shall be found in such waters after such lowering, and there is hereby granted and confirmed to every such purchaser, his heirs and assigns, all such lands: *Provided, however,* That this act shall not apply to such portions of such second class shore lands which shall as hereinafter provided be selected by the commissioner of public lands of the state of Washington for harbor areas, slips, docks, wharves, warehouses, streets, avenues, parkways and boulevards, alleys, or other public purposes: . . .

"Sec. 2. Within twelve months after the taking effect of this act it shall be the duty of the commissioner of public lands to survey such second class shore lands and in platting such survey to designate thereon as selected for public use all of such shore lands as in the opinion of said commissioner of public lands is available, convenient or necessary to be selected for the use of the public as harbor areas and sites for slips, docks, wharves, warehouses, streets, avenues, parkways and boulevards, alleys and other public purposes. Upon the filing of such plat in the office of the commissioner of public lands, the title to all harbor area so selected shall remain in the state, the title to all selections for streets, avenues and alleys shall vest in any city or town within the corporate limits of which they may be then situate, otherwise in the county in which situate, the title to and control of any lands so selected and designated upon such plat for parkway and boulevard purposes shall, if the same lie outside of the corporate limits of any city or town and if the same form a part of the general parkway and boulevard system of a city of the first class, be in such city, the title to all selections for commercial waterway district purposes shall vest in the commercial waterway district in which situate, or for which selected, and the title to all selections for slips, docks, wharves, warehouses and other public purposes shall vest in the port district if they be situate in a port district, otherwise in the county in which situate." Rem. 1915 Code, §§ 8173-1, 8173-2.

Counsel for the defendants contend that, since the lands here involved were not shore lands at the time of the execu-

tion of the state's deeds to the plaintiffs and their predecessors in interest, but were then lands under navigable waters of the state, such lands were held by the state not in its proprietary capacity, but in its governmental capacity in trust for the people of the state for the use of navigation and commerce, and for that reason they are not subject to disposition so as to vest absolute title thereto in private parties. While it is not urged that the plaintiffs have acquired no interest in these added shore lands, it is argued that their title thereto is subject to the power of the state to reserve therefrom for public use all reserved areas shown upon the plats above mentioned made by the commissioner of public lands and the harbor line commission above the designated harbor areas and pierhead lines, as well as subject to the power of the state to establish harbor areas and extensions across such added shore lands of existing roads and streets running transversely to the shore line. It seems to us that this contention cannot be sustained in the light of the history of the state's policy since admission to the Union and the decisions of this court. It is true that, by the limitations prescribed by article 15 of our constitution, the state authorities are prohibited from disposing of and vesting in absolute private ownership the lands of the state lying under navigable waters which shall be established as harbor areas; but it is also true that the same article of our constitution provides that the location of such harbor areas along the shores of navigable waters shall be determined and established by a commission appointed for that purpose, thus rendering certain the line dividing shore lands which may be disposed of and vested in absolute private ownership from the lands within harbor areas which cannot be lawfully so disposed of. Now it is no longer an open question in this state as to the nature of the title vested in the grantees of second-class tide and shore lands by deeds from the state absolute in form as these deeds are, upon which are rested the titles of the plaintiffs. The decisions of this court lead

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to no other conclusion than that the state authorities have the power to, and when conveying lands of this nature by deeds absolute in form do, vest in the grantees an absolute fee simple title to such lands. *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 589, 12 L. R. A. 632; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179; *State v. Sturtevant*, *supra*; *Anderson Steamboat Co. v. King County*, 84 Wash. 375, 146 Pac. 855.

It has also become the settled law of the state by our decision in *State v. Sturtevant*, *supra*, as we have already noticed, that the grantees of these second-class shore lands, the outer boundary of which remained undefined by the descriptions in the state's deeds except as the law defined such outer boundary as the line of navigability, acquired title out to that line as it then existed or as it might be moved farther out by any act of the state. Concluding an exhaustive review of this question involving one of the same deeds from the state upon which some of the plaintiffs' titles are rested, Justice Chadwick, speaking for the court, at page 173, said:

"We conclude, therefore, on the principal issue, that the Rainier Beach Improvement Company acquired the title to the shore lands conveyed by the state, and that it and its grantees are entitled to follow the line of navigability as it may be finally fixed by or through or in consequence of the act of its grantor, the state."

We conclude, then, that the plaintiffs acquired absolute fee simple title to these added shore lands, as they did to the shore lands existing at the time of the execution of the deeds therefor by the state.

Now this being the nature of the plaintiffs' titles, it is elementary constitutional law that such titles cannot be impaired by any act of the state after making the deeds upon which they rest. This brings us to the question of the outer boundary of the shore lands to which plaintiffs have thus acquired title, which we regard as the controlling question in

this controversy and as quite a different question from that of the nature of the plaintiffs' titles. That is, the fact that the titles so acquired are absolute in fee simple does not determine the question of where, upon the ground, are the outer boundaries of the shore lands so acquired by the plaintiffs. When that question is determined, it will follow that all of the reservations to public use designated upon the state's plats above the harbor lines established by the commissioner of public lands and the harbor line commission, except extensions of existing streets running transversely to the shore line, presently to be noticed, are attempted reservations and dedications to public use of portions of the plaintiffs' shore lands to which they have absolute fee simple title, and are therefore void as against the rights of the plaintiffs.

Had the state established harbor lines in front of these shore lands before they were conveyed by the state to plaintiffs and their predecessors in interest, it is plain that the grantees of such conveyances would have acquired title only to the lands above the harbor lines so established. It seems equally plain to us that the conveyance of shore lands by the state before the establishing of harbor lines in front thereof does not prevent the state from thereafter establishing harbor lines in front of such shore lands, and that the grantees of such shore lands take subject to the power of the state to thereafter establish harbor lines in front thereof. This is foreign to the question of whether a grantee's title to shore lands so acquired is absolute or qualified. It has to do only with the question of the outer boundaries of the granted shore lands, and that boundary, being by the terms of the grants made before the harbor lines were established, undefined except as the law may define them, we conclude leaves the matter of the outer boundaries of the shore land subject to the establishment of harbor lines by the proper state authorities. Our decision in *State v. Sturtevant*, *supra*, leads to this conclusion. What the remedy of the owner of the shore lands might be in case of the establishment of har-

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bor areas in front of such shore lands in arbitrary and fraudulent disregard of the line of navigability is not involved in this controversy. We do not want to be understood as holding that there would be no remedy in such a case.

Some contention is made in the plaintiffs' behalf that there is no power in the commissioner of public lands or the harbor line commission to establish the harbor lines here involved. The argument seems to be that the commissioner of public lands has no such power because article 15 of the constitution contemplates the establishment of such lines by "a commission," and that the harbor line commission has no power to establish these harbor lines because they are not within or in front of the corporate limits of any city or within two miles thereof. It is true that article 15 of the constitution, read in connection with Rem. 1915 Code, § 6744, extending first-class shore lands two miles beyond city corporate limits, seems to make it the duty of the legislature to cause harbor lines within such limits to be established by "a commission." However, whatever may be the duty and power of the legislature touching the establishment of harbor lines in front of cities in the light of article 15 of our constitution, we are of the opinion that the duty and power therein prescribed does not constitute a limitation of power upon the legislature touching the establishing of harbor lines in front of second-class shore lands, that is, lands beyond the limits mentioned in article 15 of the constitution, as these lands are. Rem. 1915 Code, § 6769, confers power upon the harbor line commission "to lengthen or to extend any such [harbor] areas now existing or which may hereafter be existing in front of any city or town;" and § 2 of the act of 1913 (Id., § 8173-2) above quoted, authorizes the commissioner of public lands to select and plat harbor areas in front of the second class shore lands of Lake Washington, including the very lands here involved. That section further provides that "the title to all harbor area so selected shall remain in the state." It might well be argued that the action of the commissioner of public

lands alone, in pursuance of this power, would constitute a lawful establishing of these harbor areas. We are, however, quite convinced that when the harbor line commission joined with the commissioner of public lands in the making of these plats and entered its formal order establishing the harbor lines designated thereon, such joint action of the commissioner of public lands and the harbor line commission constituted a lawful establishing thereof. It seems to us quite clear that this was within the power of the legislature to provide for, even though the constitution has made special provision for the establishing of harbor lines in front of cities. We conclude, therefore, that these harbor lines and harbor areas were lawfully established. It is true that the constitution does not in terms prohibit the sale into absolute private ownership of harbor areas other than such areas as are to be established "within or in front of the corporate limits of any city or within one mile thereof;" but plainly a grant of second-class shore lands was never intended to convey land beyond the line of navigability, which line we must assume in this case was properly determined in so far as the harbor lines here involved are concerned.

It is contended in plaintiffs' behalf that the reservations made upon the state's plats of the extensions of existing transverse streets over the added shore lands is as much an invasion of their rights as the reservations upon the state's plats of streets, boulevards and parkways running longitudinally over the added shore lands above the harbor and pierhead lines. As we read the decree of the superior court, it only quiets title to the defendants state and municipal corporations, as representatives of the public, in those extensions of existing roads and streets running transversely to the shore lines which have been dedicated as such by the owners across their shore lands to the added shore lands, limiting such extensions to the width of the dedicated roads and streets where they abut upon the added shore lands. It seems to us that the principle which entitles the plaintiffs,

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as owners of the shore lands, to claim the added shore lands because they became a part of the original shore lands, also entitles the defendants, as representing the public, to claim the added shore land which is in front of and abutting upon the end of the existing streets running transversely to the shore line. In other words, the public's right to extend its ownership over the added shore lands is at least as great as that of the private owners of the original shore lands. Since apparently the roads and streets which are here involved and extended transversely across the added shore lands are substantially at right angles to comparatively straight shore lines, we are not here concerned with the question of converging or diverging side lines of shore lands, as might be involved when such lands abut upon a curved shore line.

We note that upon the state's plats, copies of which are here in evidence, there is designated sites for slips and wharves, some of which appear above the established harbor areas and above the designated pierhead lines where there are no designated harbor areas, and some of which appear to be within the established harbor areas. We construe the decree as meaning that the titles of the plaintiffs are quieted as against the claims of the defendants only in those sites for slips and wharves and portions thereof designated upon the state's plats above the designated harbor areas and pierhead lines, and not those designated sites for slips and wharves and portions thereof which are within the designated harbor areas. The decree being in general terms rather than by specific descriptions of each tract as to which title is adjudged to be in plaintiffs or defendants, induces us to here note our construction of its meaning touching the title of the respective parties in these designated sites for slips and wharves, to the end that our decision and the decree may not be construed as awarding to the plaintiffs any title to the harbor areas.

The decree seems by its terms to quiet title in the plaintiffs to all sites for slips, wharves, etc., designated upon the state's plats, unqualifiedly, except such as are designated

within harbor areas. This would seem to include such designated sites and tracts as abut upon designated "pierhead lines" where there are no harbor lines or harbor areas, and be an adjudication against the state touching its power to establish inner harbor lines which might fix the outer boundary of the shore land inside the designated pierhead lines. It seems to us that these, as well as other shore lands in front of which no harbor lines are established, are held subject to the power of the state to establish harbor lines in front thereof, and that the decree should be modified accordingly. The designation of a "pierhead line" alone, upon the state's plats, is not, as we view the law, the establishing of harbor lines or harbor areas. These words may suggest the outer limits of piers, but we think they should in no event be construed as fixing the inner harbor line, which when established becomes the outer shore land boundary.

Counsel for the defendants have learnedly discussed at great length, and reviewed many authorities, touching the doctrine of *jus publicum* as applied to the state's ownership and dominion over shore lands and lands under navigable waters bordering thereon, with a view of demonstrating want of power in the state, or rather its constituted authorities, to vest in absolute private ownership these added shore lands. As we view the problem here presented, however, it is not so much a question of the power of the state to vest in private ownership the lands or harbor areas here involved, but it is a question of where, upon the ground, is the line between shore lands which the state has the power to vest in private ownership, and harbor areas and other lands under navigable water which cannot be so disposed of. Our holding here is, and we need go no farther, that the state has the power to determine where the line dividing these two classes of lands shall be located upon the ground, and has lawfully done so in so far as it has established the harbor areas designated upon the state's plat made by its commissioner of public lands and harbor line commission.

Oct. 1916] Concurring Opinion Per CHADWICK, J.

We have proceeded upon the assumption, as already stated, that all of the attempted reservations to public use of tracts and areas designated upon the state's plats are from lands outside the shore lands as they existed at the time of the execution of the state's deeds upon which the plaintiffs' rights are rested. If we are wrong in this assumption of fact, it is of no material consequence in this controversy, since, from what we have said, we think it is rendered plain that the rights of the plaintiffs in the shore lands, as those lands existed at the time of the execution of the state's deeds, are no less than their rights to the added shore lands, and that both the original and added shore lands are held by the state's grantees subject to the power of the state to establish harbor lines, and thereby define the outer boundaries of the shore lands.

We conclude that the decree of the superior court should be modified in its terms only so far as to render certain that it will not constitute an adjudication estopping the state from exercising its power to establish harbor lines and harbor areas in front of the plaintiffs' shore lands where no harbor lines or harbor areas are now established, and thus define the outer boundaries of such shore lands, and that in all other respects the decree should be affirmed. It is so ordered, and the superior court is directed to modify and make certain the decree accordingly. None of the parties will recover costs in this court.

MORRIS, C. J., HOLCOMBE, ELLIS, FULLERTON, MOUNT, and MAIN, JJ., concur.

CHADWICK, J. (concurring).—The use of the words "pier-head line" on the plat prepared by the state, and in the decree, is an unfortunate misuse of terms. The words mean nothing under our constitution and statutes. In some of the eastern states, we understand that "pierhead lines" are defined, but the constitution makers in this state were careful to avoid the confusion that may result from the drawing of

an arbitrary line beyond which piers and docks should not be erected, by providing for an inner and an outer harbor line with an intervening area subject to state ownership and control.

It may be that the commissioner of public lands and the harbor line commission intended the line so designated to be the outer harbor line, subject, of course, to the approval of the war department, for, under our law, piers or wharves could be built in the harbor area between the inner and the outer harbor line, and in that sense, if there be no further limitation, the outer harbor line is a "pierhead line." But I agree that we should not assume anything against the future right of the state to define, in terms, that which it has reserved—the right to fix an inner and an outer harbor line. Treating the words "pierhead line" as without legal meaning under our statutes, the conclusion follows as indicated by Judge Parker.

I deem it my duty to suggest that the commissioner of public lands should, without delay, file an amended plat, fixing the harbor lines in Lake Washington in front of the city of Seattle. Until this is done, there will be a confusion of interests, with no way of determining legal rights.

I do not want to be understood as holding that the legislature could not provide for the drawing of a "pierhead line" between the inner harbor line and the outer harbor line, either through the instrumentality of the harbor line commission, the commissioner of public lands, a harbor commissioner or port warden, or by an independent board. What I do hold is that it cannot be done in any event until the harbor lines are established.

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Opinion Per HOLCOMB, J.

[No. 13328. Department Two. October 9, 1916.]

L. S. BREAKS, *Respondent*, v. SPOKANE AUTO COMPANY,
Appellant.¹

SALES—CONDITIONAL SALES—FORFEITURE—WAIVER. Where plaintiff purchased an automobile for \$1,220, paying \$1,000 in cash, taking a conditional bill of sale and giving a note for the balance, and afterwards left the car for resale with defendant, who offered to find some plan for disposing of the car so that plaintiff could get his money out of it, and plaintiff relied thereon, it is unconscionable to enforce a forfeiture, upon defendant's repairing the car at a cost of \$242, and selling it for \$1,000, without any declaration of forfeiture.

EQUITY—MAXIMS. A small item of \$11.80 interest on a repair bill, that possibly was offset against other items involved, may be disregarded on the principle of *de minimus non curat lex*.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered August 27, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

J. D. Campbell, for appellant.

HOLCOMB, J.—Respondent, in November, 1912, purchased a Buick automobile from appellant for \$1,220.70, paid \$1,000.70 cash and gave appellant a note for \$220 on which one dollar was indorsed. A conditional bill of sale was executed by the parties and duly filed, reserving title to the automobile in the appellant. The note was due March 1, 1913, and was not paid. Respondent took an agency at North Yakima and put in some time there attempting to sell Buick cars. Failing in that enterprise, he returned with the car to Spokane. Thereafter he frequently put the car in appellant's garage for sale, for greater or less periods of time, and at intervals used the car for his own purposes. In November, 1913, appellant reclaimed and repossessed the car, repaired, overhauled and repainted it and, in March, 1914,

¹Reported in 160 Pac. 291.

resold it for \$1,000. The repairs and repainting cost \$196.62. There was due on respondent's note at the time of the resale, in principal and interest, \$242.36. Another note for \$85, given by respondent on May 13, 1913, to E. C. Finley, with eight per cent interest per annum, had been assigned and transferred by Finley to appellant, and was set up as a counterclaim against respondent.

The trial court found the facts in favor of respondent, and found, among other things, that it was "against the conscience of the court to declare a forfeiture under the conditional bill of sale," and that "there was no express declaration of forfeiture by appellant."

The record discloses that Finley, manager for appellant, out of friendliness for respondent and his mother, had undertaken to protect respondent. He expressly offered, both to respondent and to his mother, by letter, "to find some plan for disposing of the car so that he [respondent] would get his money out of it." Unusual and unbusinesslike as such generosity may be, it so stood, and respondent relied upon it; and when appellant repossessed itself of the car without any declaration of forfeiture, and resold it for a sum amply sufficient to recompense itself for its unpaid debt and for all its outlays and respondent's outlay, we think the court justified in holding it unconscionable to enforce a forfeiture of the conditional bill of sale. By its judgment, the court undertook to make both parties whole upon the entire transaction of the parties, and we think it did so.

There is a trifle of \$11.80 interest appellant claims should, in any case, have been allowed by the court upon the repair bill of \$196.62, at the legal rate. The court allowed the full amount claimed for repairs, which was doubtless large enough, and possibly offset this small item against other items involved. *De minimis non curat lex.*

Judgment affirmed.

MORRIS, C. J., and PARKER, J., concur.

MAIN and BAUSMAN, JJ., concur in the result.

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Opinion Per MAIN, J.

[No. 13342. Department Two. October 9, 1916.]

IMPERIAL CANDY COMPANY *et al.*, Respondents, v. THE CITY
OF SEATTLE, Appellant.¹

MUNICIPAL CORPORATIONS—WATER WORKS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Negligence of the city is established where a break in a water main, flooding the plaintiff's premises, was due to the improper use of a cast-iron bushing instead of a metal of greater strength, which broke when, after ten years, the foundation of a heavy meter decayed and cast the weight upon the bushing, and the condition of the foundation could have been readily ascertained by an inspection which the city failed to make.

SAME—WATER WORKS—NEGLIGENCE—DAMAGE TO GOODS—PROXIMATE CAUSE. Damage to goods in the basement of the building is the natural and probable consequence of the breaking of a three-inch water main leading into the basement, so that negligence leading to the break was the proximate cause of the damage.

SAME—WATER WORKS—DAMAGE TO GOODS—CONTRIBUTORY NEGLIGENCE. In an action for damages to goods stored in a basement through the breaking of a water main, contributory negligence cannot be attributed to the plaintiff, a tenant, from the fact that there was no drain from the basement as required by city ordinance, which did not forbid the use of such a basement by a tenant, and where it was not claimed that the building was so constructed without obtaining a permit.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 5, 1915, upon findings in favor of the plaintiffs, in an action for damages to property, tried to the court. Affirmed.

James E. Bradford, Melvin S. Good, Hugh M. Caldwell, and Walter F. Meier, for appellant.

John W. Roberts and George L. Spirk, for respondent Imperial Candy Company.

MAIN, J.—The purpose of this action was to recover damages to personal property caused by the breaking of a water main owned by the city of Seattle. The defendant, The J. M.

¹Reported in 160 Pac. 303.

Colman Company, was the owner of the building in which the property was at the time the damage occurred. The trial resulted in a judgment of dismissal as to the Colman Company, and a judgment in favor of the plaintiff and against the city in the sum of \$1,051.93, together with interest.

The facts are these: On March 3, 1913, the respondent was occupying, and for about nine years previous had occupied, rooms in the basement of the building owned by the Colman Company, the west front of which was on Western avenue. One of the city water mains extended along this avenue. Under the sidewalk on the east side of the street a pit had been constructed in which the water meter was placed. The service pipe leading from the street main to the pit was approximately four inches in diameter. After the pipe entered the pit, it was reduced to a three-inch pipe. For this purpose it was necessary to use an elbow and bushing. The bushing used in making the connection was cast iron. The three-inch pipe extended from the place where the connection was made to the meter and into the building. About ten years previous to the date mentioned, the first meter had been installed in the pit upon a foundation consisting of boards placed upon the earth. At the time the main broke, the boards had become decayed, and the only inference from the evidence is that the foundation of the meter had become so defective as not longer to furnish it support. The meter not being supported by the foundation, its weight was carried by the pipe to which it was attached, and the strain caused by this weight was borne by the cast-iron bushing. The meter when filled with water would weigh three or four hundred pounds. There was more or less hammering in the pipes due to the large amount of water which was used for operating elevators.

When the pipe broke, a stream of water from the four-inch opening extended upwards approximately thirty feet. Some of this water found its way into the room in the basement in which the respondent's property was stored. This

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property consisted of crackers, sugar, candy, and other like articles. The water upon the floor of this basement became six or eight inches deep.

The theory of the action was that the cast-iron bushing which broke was improper construction, and that the city had not exercised reasonable care in inspecting and replacing the foundation under the meter. The evidence sustains the position that the use of the cast-iron bushing was improper construction. The evidence also shows that the condition of the foundation under the meter could readily have been ascertained by an inspection. Access to the pit in which the meter was placed could be made through an opening in the sidewalk through which the meter reader entered the pit.

It is claimed that the city was negligent in one or two other particulars, which need not be referred to, as, in our opinion, the condition of the foundation under the meter was readily ascertainable by a reasonable inspection. The failure to inspect and replace the foundation was not the exercise of the proper degree of care on the part of the city. The lack of a foundation, together with the use of the cast-iron bushing instead of a metal of greater strength, was what caused the break and permitted the water to escape.

In this connection some claim is made that, even though the city were negligent in the particulars mentioned, such negligence was not the proximate cause of the damage to the respondent's property. But this contention cannot be sustained. The damage to the property was plainly the natural and probable consequence of the breaking of the main. The damage which occurred was such as would reasonably be anticipated by the breaking of a water main and releasing a stream of water the size of that mentioned. The case of *Ottevaere v. Spokane*, 89 Wash. 681, 155 Pac. 146, was based upon a different state of facts, and is not controlling.

Another contention of the city is that the respondent was negligent in using the basement of the building because there was no drain therein as required by the city ordinance. The

respondent was not the owner of the building, but a tenant of the owner. The evidence shows that the floor of the basement was below the level of the sewers in the adjacent streets. It is not claimed that the concrete floor in the basement was constructed without first having obtained a permit from the city as required by the building ordinance. The ordinance referred to did not forbid the use by a tenant of a basement in which no drain had been constructed. We think the respondent, in storing his property in this basement, was not guilty of negligence.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and BAUSMAN, JJ., concur.

[No. 13356. Department Two. October 9, 1916.]

C. W. REED *et al.*, *Respondents*, v. FRED FIRESTACK *et al.*,
Appellants.¹

BOUNDARIES—LOCATION—REESTABLISHMENT—EVIDENCE—SUFFICIENCY. Evidence to fix a section corner one-half mile from its true location as called for by the government field notes must be clear and certain.

SAME—LOCATION—REESTABLISHMENT—FIELD NOTES. Where there is no evidence of any of the interior section corners on a township line, commissioners appointed in pursuance of Rem. 1915 Code, § 948, properly reestablish the same by following the government field notes.

SAME—PROCEEDINGS TO REESTABLISH—REPORT OF COMMISSIONERS—EXCEPTIONS. In proceedings to reestablish a lost boundary line, under Rem. 1915 Code, § 948, exceptions need not be taken to the advisory report of the commissioners as to the location of a corner two miles distant, which they did not follow in their conclusions and which was disregarded by the court.

SAME—REESTABLISHMENT—EVIDENCE. The location of a lost boundary line cannot be influenced by the fact that a section corner a mile distant had been recognized by a number of other owners not interested in the controversy, in the absence of evidence that it was the true corner.

¹Reported in 160 Pac. 292.

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Opinion Per PARKER, J.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered September 20, 1915, upon findings in favor of the plaintiffs, in an action to establish a boundary line, tried to the court. Affirmed.

Cade & Barrows, for appellants.

C. B. Hughes and Hughes & Adams, for respondents.

PARKER, J.—This action was commenced in the superior court for Douglas county under Rem. 1915 Code, §§ 947-949, to establish the uncertain north and south boundary lines of section 18, township 28 north, range 20 east, in Douglas county, and to restore the lost corners of the United States survey thereof. Trial in the superior court resulted in findings and judgment in accordance with the contentions of plaintiffs, the owners of section 18, from which the defendants Firestack and Cox, owners of the land in section 24, adjoining section 18 upon the south, have appealed to this court, so that the only boundary line directly in controversy upon this appeal is that between sections 18 and 24.

The Columbia river runs southerly, bearing slightly to the west, through this township, leaving approximately two tiers of sections thereof east of the river. There is no evidence in the record before us as to the location upon the ground of any of the government corners in that portion of the township lying to the west of the river. The case manifestly proceeded to trial, both upon the part of counsel and the trial court, upon the theory that the true location of the lines and corners drawn in question are determinable from the known location upon the ground of the section and quarter section corners of that portion of the township lying to the east of the river. The locations upon the ground of the section corners in the south boundary of the township, including the southeast corner of the township east of the river, are conceded to be known locations and marked by monuments. The township was originally surveyed by deputy United States

surveyor Holcomb in the year 1884. This survey appears to have been very imperfectly made, in so far as marking the corners is concerned, so much so that there remains no reliable evidence of the markings upon the ground by Holcomb of the corners east of the river other than the two corners in the south boundary and at the southeast corner of the township, above mentioned.

In 1887, Deputy United States surveyor Navarre, under contract with the United States, surveyed the township lying immediately to the east. When he came to closing the section lines of his survey on the east line of this township previously surveyed by Holcomb, he was unable to find any monuments marking the section or quarter section corners of the Holcomb survey on the township line other than at the southeast corner of the township. He was thereupon directed by the United States surveyor general of Washington Territory to resurvey this township line and mark the section and quarter section corners thereon, which he accordingly did and placed proper monuments marking all the corners common to both townships. Whether the survey and markings on this township line by Navarre be regarded as a new independent survey or simply as a survey for restoring the lost section and quarter section corners established by Holcomb in the original survey thereof, we think is of no consequence here, because, as we view the evidence, the result would be the same; that is, Navarre's survey resulted in placing the monuments marking the section and quarter section corners on the township line in the same location that they would be placed in restoring them by following Holcomb's survey as evidenced by his field notes. The monuments at section and quarter section corners thus reestablished by Navarre were found in place by the commissioners appointed by the court in this action, except the southeast corner of section 18 (being the southeast corner of respondents' land), which corner had become lost. This corner, however, was readily reestablished from the known corners next north and south thereof. The only monument or

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location upon the ground seriously claimed by appellants as the known location of any of the interior section or quarter section corners as established by the Holcomb survey is a stone claimed by them to mark the southwest corner of section 14, which stone is two miles west and about one-half a mile north of the southeast corner of section 13, as determined by the Navarre survey, which, as we have seen, was in effect a restoration of that corner as originally established by the Holcomb survey. This stone is about three and one-half miles north of the south boundary of the township, and hence about one-half mile north of the place where the southwest corner of section 14 should be found if still existing upon the ground. The trial court was of the opinion that the evidence was wholly insufficient to prove that this stone in fact marked the original location of the southwest corner of section 14 as established by Holcomb.

A careful review of the evidence leads us to agree with the conclusion of the trial court upon this question of fact. The rule that evidence of a section or quarter section corner existing at a point upon the ground materially different from that called for by the field notes, and the presumption of law as to its true location being approximately where the law requires it to be, must be clear and certain in order to so fix such corner at such a location, is peculiarly applicable to this situation, where we find the claimed corner approximately one-half mile from where it is in law presumed to be and where the field notes of the survey place it. We deem it sufficient to say that we regard the evidence as falling far short of so establishing this corner as claimed by appellants. Some two or three locations on or near the north line of the township east of the river are also claimed by appellants as being the true locations of original corner monuments on that line as established by the original Holcomb survey. We regard the evidence of these locations being the original locations established by Holcomb equally uncertain and unsatisfactory, as the trial court evidently did. These locations, however, being

on the claimed north line of the township, we think would have but little influence in this case in any event, since they would tend to show little else than a surplus in the sections along the north line of the township.

The trial court appointed three commissioners to make a survey of the north and south boundaries of section 13, erect monuments marking the same and report their doings in that behalf to the court, in pursuance of Rem. 1915 Code, § 948. Having completed their work, the commissioners reported to the court, in substance, that they had adopted the northeast and southeast corners of section 13 as reestablished by the Navarre survey on the east line of the township; that they then established the southwest and northwest corners of section 13 at points three and four miles, respectively, north of the south boundary and one mile west of the east boundary of the township, following the field notes of the original Holcomb survey of the township in so doing. They reported that no corner in the interior of the township could be found by them except the corner claimed by appellants as the southwest corner of section 14, which, while they seem to have regarded that as the true southwest corner of section 14, they ignored it in their conclusion in establishing the southwest and northwest corners of section 13 as they did. They were also manifestly uninfluenced by the corners on the north line of the township, claimed by appellants to be corners established by the Holcomb survey, whatever their views may have been as to the correctness of such locations as claimed by appellants. That the commissioners correctly determined the location of the southwest and northwest corners of section 13 from the field notes of the Holcomb survey and the field notes and existing monuments on the township line of the Navarre survey is quite plain. Indeed, counsel for appellants do not seem to contend that this was an erroneous establishing of those corners of section 13 if there were no other known corners than those upon the east and south line of the township. So in its finality the whole con-

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troversy really becomes one of fact as to whether or not there were any known corners from which the southwest and northwest corners of section 13 could be reestablished other than the known corners upon the east and south lines of the township. The following remarks of Chief Justice Dunbar, speaking for the court in the early case of *Cadeau v. Elliott*, 7 Wash. 205, 34 Pac. 916, are peculiarly applicable to the situation we find here:

"There are really no questions of law to be decided in this case, for the proposition contended for by appellants, viz., that the true corner is where the United States surveyor established it, notwithstanding its location may not be such as designated in the plat or field notes, is elementary, and in fact is conceded by the respondents; and it is also undoubtedly true that though neither course, distance or computed contents agree with the monument yet the monument must prevail. But this presumes the fact that the monument, or actually established corner, is definitely ascertained. If any credit at all is to be given the plats and field notes, the presumption must attach that the corners have been established at the places indicated by such field notes; so that the burden is upon him who disputes their correctness. But where, as in this case, the establishment of the corner as claimed by the appellants does not accord with the field notes of the government surveyor, and does not accord with the section lines in adjoining sections, and will establish the claim in an irregular shape, the proof of such actual establishment must be clear and convincing."

See, also, *Stangair v. Roads*, 41 Wash. 583, 84 Pac. 405.

It seems to us there is no escape from the conclusion that the adoption by the commissioners of the northeast and southeast corners of section 13 as established by the Navarre survey, and the restoration by them of the southwest and northwest corners of section 13 in conformity with the Holcomb survey and field notes, ignoring the claim of appellants as to the location of the southwest corner of section 14, and the decree of the court in accordance with this establishing of the boundary lines of section 13 by the commissioners, was a

correct determination of the rights of the parties to this action.

Some contention is made in appellants' behalf that the trial court erred in ignoring the conclusion of the commissioners that the monument marking the southwest corner of section 14 correctly marked that corner as established by the Holcomb survey, in view of the fact that no exception was taken thereto, prior to the trial, by counsel for respondents. We do not think this fact renders that conclusion of the commissioners binding upon the trial court, since, by the express provisions of § 948, the report is only advisory to the court, and besides, in this particular case, it would seem that counsel for respondents had no occasion to take exception to the commissioners' report, in view of the fact that their conclusion as to the location of the southwest and northwest corners of section 13 was as at all times claimed by respondents. The trial of the case proceeded after the report of the commissioners upon the theory, recognized by all concerned, that counsel for respondents were contending that the conclusion of the commissioners as to the proper location of the southwest corner of section 14 was erroneous, much evidence being introduced upon both sides touching this question. The trial court was of the opinion that the evidence showed that the commissioners' conclusion on this question was erroneous, though it agreed with the commissioners in their conclusion as to the location of the southwest and northwest corners of section 13, which was the real matter for ultimate decision.

Some contention is made in appellants' behalf touching the question of taxation of costs. This, we think, is clearly without merit. Indeed, it seems plain to us that if any of the parties had reason to complain of the taxation of costs it was respondents.

We are of the opinion that the judgment of the trial court must be affirmed. It is so ordered.

It incidentally appears in this record that the location of the southwest corner of section 14, as claimed by appellants,

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has probably been relied upon by a number of owners in its vicinity as the true location of that corner, and that a number of owners have claimed and recognized boundary lines between different ownerships accordingly. This has been suggested by counsel for appellants as one of the reasons for recognizing that location as the true southwest corner of section 14, and that it should control the location of the south line of sections 13 and 14. From what we have already seen, however, we think it plain that the true line between sections 13 and 24, the properties of these respondents and appellants, respectively, cannot be determined by that claimed location of the southwest corner of section 14, in the absence of evidence that it was in fact that corner of that section as established by the Holcomb survey. The manner and extent to which that corner has been recognized by those owning land in the neighborhood may have some influence upon their rights, but it is in no sense a determining factor in this controversy, since we think it is plain from the evidence that neither of these parties ever became entitled to place any reliance upon that location as the true southwest corner of section 14, as determinative of the question of the true location of the south boundary of section 13. We are not here concerned with the rights of other parties than those to this action, and, of course, our decision in this case can affect only the rights of the parties to this action.

MORRIS, C. J., MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 18359. Department Two. October 9, 1916.]

MARGARET M. MARSHALL, *Respondent*, v. FRANK DUNN *et al.*,
Appellants.¹

WITNESSES—CREDIBILITY—CONVICTION OF CRIME. In a civil action for an assault and battery, the record of defendant's conviction in the police court for the commission of the same assault and battery is admissible when offered for the sole purpose of affecting the weight to be given to the testimony of the defendant as expressly provided in Rem. 1915 Code, § 2290.

WITNESSES — CREDIBILITY — CONVICTION—"CRIME"—STATUTES. An assault and battery, even if made punishable by a municipal ordinance as a misdemeanor, being *malum in se*, is a "crime," within Rem. 1915 Code, § 2290, permitting a conviction of crime to be shown for the purpose of affecting the weight to be given to the defendant's testimony.

APPEAL—ASSIGNMENT OF ERRORS—REPLY BRIEF. Errors claimed in the appellant's reply brief need not be considered when not assigned in his opening brief, under the express provisions of Rem. 1915 Code, § 1730.

APPEAL—REVIEW—NEW TRIAL—DISCRETION. The discretion of the trial court in refusing a new trial for alleged newly discovered evidence will not be disturbed on appeal where the evidence submitted was contradicted and abuse of discretion was not shown.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered June 18, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Mulligan & Bardsley and *O. C. Moore*, for appellants.

Corkery & Corkery, for respondent.

PARKER, J.—The plaintiff seeks recovery of damages for personal injuries which she claims as the result of an assault made upon her by the defendants. Trial in the superior court for Spokane county resulted in verdict and judgment against the defendants, from which they have appealed to this court.

¹Reported in 160 Pac. 298.

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It is first contended in appellants' behalf that the trial court erred to their prejudice in admitting evidence of the conviction and fining of appellant Dunn in the police court of the city of Spokane for the commission of an assault made upon respondent, which, it may be inferred, though not clearly shown, was the same assault involved in this action. Counsel for respondent offered in evidence the record of this conviction of appellant Dunn in the police court. The court ruled admitting the offered record, but immediately changed its ruling rejecting the record. This occurred in the presence of the jury, but evidently the jury did not then see the record nor was it then read to them. It does not appear in the record of this case that this offer was renewed by counsel for respondent, though the record of appellant Dunn's conviction in the police court appears as an exhibit in this case. We may assume, for the purpose of argument, that it went into the jury room with the other exhibits, but it appears from the record before us that appellant Dunn admitted upon his cross-examination that he had been convicted in the police court and fined twenty dollars for assaulting respondent. This fact was sought to be proven by counsel for respondent, both by his offer of the police court record and by his cross-examination of appellant Dunn, for the sole purpose of affecting Dunn's credibility as a witness. The fact that he had not testified when the police court record was first offered is the apparent reason for the court's rejection of it at that time. The court plainly told the jury that the fact of Dunn's conviction was to be considered by them only as affecting his credibility as a witness. We note that the offer of the proof of Dunn's conviction in the police court by the record thereof and by cross-examination of appellant was only generally objected to by counsel for appellant in that it was "incompetent, irrelevant and immaterial." Nor does the record before us indicate any more specific statement of their objection in argument to the court.

In their opening brief, counsel for appellant make only the general claim of error touching the proof of Dunn's conviction in the police court; that "The court erred in permitting the respondent to introduce any testimony in reference to the alleged conviction in the Spokane police court." This contention is presented to us in the opening brief with citation of a number of authorities but with little argument, indicating that counsel in their opening brief were only relying upon the general rule that a judgment in a criminal action is not admissible in evidence in a civil action against the same defendant to show that he is liable in damages, though the question of the defendant's guilt in the criminal action may be in substance the same as the question of his liability for damage in the civil action; citing 2 Black, Judgments (2d ed.), § 529; 1 Greenleaf, Evidence (16th ed.), 537; 3 Cyc. 1098, and other authorities. We have seen, however, that the fact of Dunn's conviction in the police court of the crime of assault was offered in evidence, not for the purpose of showing his liability for damages in this action, but only for the purpose of affecting the weight of his testimony, which it is expressly provided by Rem. 1915 Code, § 2290, may be done, which section has been given full force and effect by our decisions in *State v. Blaine*, 64 Wash. 122, 116 Pac. 660; *State v. Stone*, 66 Wash. 625, 120 Pac. 76; *State v. Overland*, 68 Wash. 566, 123 Pac. 1011. It would seem plain, then, that unless we find in appellants' opening brief some other assigned reason for the rejection of this evidence, we must hold that no error was committed by the trial court in its admission of which we can here take notice. There seems to be no other reason suggested in appellants' opening brief.

One contention, however, is made in appellants' reply brief which might be considered as included in the contentions made in their opening brief, which possibly merits some attention. It is argued that, since it appears that the conviction and fining of appellant Dunn was in the police court of the city of Spokane, we must proceed upon the assumption that it

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was a conviction of a violation of a city ordinance and not of a state law, and that, therefore, the offense of which he was so convicted was not a crime within the meaning of Rem. 1915 Code, § 2290, and our decisions above noticed. It seems to be conceded by counsel for appellants that that section and our decisions thereunder make the rule applicable to misdemeanors as well as felonies, classing both as crimes within the meaning of the rule. Indeed, our decision in *State v. Overland*, *supra*, seems to expressly so hold. The authorities are not in harmony upon the question of whether or not offenses defined by and punishable under city ordinances are crimes, using that word as including also misdemeanors. We are of the opinion, however, that when a valid city ordinance makes punishable an act which is *malum in se*, wrong within itself, as of course an assault is, such act is a crime within the meaning of § 2290, and our decisions above noticed. The decision of this court in *Spokane v. Smith*, 37 Wash. 588, 79 Pac. 1125, where it was held that a prosecution under a city ordinance for an act not *malum in se* was a criminal prosecution, would seem to argue that even such an act is a crime, though the question of its being a crime within the meaning of § 2290 may not be free from doubt.

Some other contentions are made in the reply brief of counsel for appellants touching the claimed error of the court in admitting proof of the conviction of appellant Dunn in the police court. These contentions, however, were not made in the opening brief, so we do not feel called upon to further notice them. Rem. 1915 Code, § 1730. We are of the opinion that the court did not err to the prejudice of appellants by the admission of evidence of appellant Dunn's conviction in the police court, in so far as we are here called upon to take notice of counsel's claim of error in the admission of that evidence.

One of the grounds of new trial relied upon by counsel for appellants is newly discovered evidence. Several affidavits were presented to the trial court in support of this ground

for a new trial. There were also presented to the trial court counter affidavits which challenged the truth of a considerable portion of the statements made as to the alleged new evidence being in fact newly discovered, and also as to the truth of a considerable portion of the alleged new evidence. We deem it sufficient to say that this contention presents only the question of abuse of discretion of the trial court in the denial of the motion for new trial, and we are quite clear such discretion was not abused in the disposition of the motion adverse to appellants.

The judgment is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and BAUSMAN, JJ., concur.

[No. 13399. Department Two. October 9, 1916.]

F. J. TETZNER, *Respondent*, v. HENRY C. WULF, *Appellant*.¹

VENDOR AND PURCHASER—CONTRACTS—ASSUMPTION OF MORTGAGE—PAYMENT OF PURCHASE PRICE. Where, upon the sale of lots, the price was fixed at \$20,000, and was to be paid by the assumption of local improvement liens, the assumption of mortgages, the conveyance of a lot, and the balance in cash, without any agreement to pay the \$20,000 in any event, and there was nothing to indicate that the vendee, in meeting the incumbrances, was acting as agent of his vendor, the vendor cannot recover of the vendee a portion of the mortgage indebtedness which the vendee was not required to pay.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 4, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

William E. Froude and Higgins & Hughes, for appellant.
James Kiefer, for respondent.

MAIN, J.—This action arises out of a real estate transaction in which the plaintiff sold to the defendant, Wulf, a certain lot in the city of Seattle. Recovery is sought for

¹Reported in 160 Pac. 289.

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money claimed to be due to the plaintiff. In response to the complaint, the defendant Wulf filed an answer and cross-complaint. In the cross-complaint, he claimed that there had been misrepresentation as to the amount of excavation which had previously been done upon the lot, and sought to recover in damages. The other defendant, Grant Smith & Company, took no part in the trial of the case in the superior court, and is not now interested in the controversy. The trial of the action resulted in a judgment for the plaintiff in the sum of \$1,376, and interest, and a denial of the relief prayed for in the cross-complaint. From this judgment, Wulf appeals.

As to the controlling facts, there is no substantial dispute, and they may be stated as follows: On August 14, 1912, the respondent was the owner of a lot in the city of Seattle, located in what is generally known as the Denny Hill regrade district. On this date, through his agent, H. E. Orr Company, a corporation, he contracted in writing to sell the property to the appellant. This contract recites that H. E. Orr Company, as agent of the owner, "has this day sold to the purchaser for the sum of twenty thousand dollars" the lot mentioned. The contract further recites that the purchaser assumes and agrees to pay the incumbrances against the property, which included local improvement assessments and two mortgages. The contract also provided that, in case the amount of any of the local improvements could not be ascertained at the time the transaction was closed, the cost thereof should be estimated, and such amount retained by Wulf out of the purchase price. As a part of the purchase price, Wulf was to convey to the respondent a lot which he then owned, and upon which there was a mortgage of \$1,000, as part payment in the sum of \$3,000.

One of the mortgages was held by the contractor who had done the excavating upon the lot in connection with the ex-

cavation of the streets in the vicinity. Under the contract as originally made, the contractor was to excavate the street and a one to one slope upon the adjacent property. Thereafter the contract was sought to be modified so that the city would be charged with the excavation of the street and a slope of only three-fourths to one upon the adjacent property, and that the balance should be charged to the owner of the property. The mortgage to the contractor included the wedge shaped excavation between the slope of one to one and three-fourths to one.

After the present transaction had been closed, in *Atwood v. Smith*, 64 Wash. 470, 117 Pac. 393, it was held that the property owner could only be charged upon the basis of a slope of one to one. In this case, the mortgage, having previously been given to Grant Smith, covered the wedge of earth mentioned, and was for an amount which was not properly chargeable to the property owner. This excess amounted to the sum of approximately \$1,100.

When the case was called for trial in the superior court, Grant Smith & Company appeared and consented to a credit on the mortgage in the sum mentioned. This was agreed to by all parties, and the action then proceeded to determine whether the vendor or the vendee was entitled to the benefit of the credit.

When the transaction was closed, the amount of the local improvement assessments could not be definitely ascertained, and they were estimated at \$4,149.17, the two mortgages were assumed, amounting to \$5,974.85, the lot owned by appellant was conveyed to the respondent, and the balance was paid in cash.

The question is whether a vendor who sells property for a price named, which price is to be paid by the vendee by the assumption of local improvement assessments, the amount of which must be estimated, by the assumption of certain mortgages, and by the transfer of other property, and the balance in cash, can recover from the vendee that portion of

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the mortgage indebtedness which he was not required to pay.

The vendee cannot be held to respond to the suit of the vendor in such case unless he had agreed to pay the full purchase price of the property in any event, and, in liquidating the liens which were against the property, he was acting as the agent of the vendor in disbursing his funds. This question seems not to have been often before the courts. In two cases in which the question has been considered, it was held that the question was one of agency. In other words, if the vendee, in paying the obligations assumed, acted as the agent of the vendor, then the vendor would be entitled to any deduction. On the other hand, if as between the vendor and vendee, the latter became primarily liable to pay the obligations assumed, and the vendor secondarily liable, any deduction from the incumbrances assumed would inure to the benefit of the vendee. *Miller v. Barler*, 89 Tex. 264, 34 S. W. 601; *Koch v. Roth*, 150 Ill. 212, 37 N. E. 317.

In the case first cited, it was held that, under the facts in that case, there was no relation of principal and agent, and, therefore, the vendee was entitled to the benefit of a reduction from a contract which he assumed as a part of the purchase money, but was not required to pay in full.

In the second case, owing to the particular facts there presented, it was held that the vendees were the agents of the vendor for the purpose of paying certain claims out of the purchase price of the property, and that having compromised the claims for less than their face value, the vendor was entitled to the benefit of such compromise.

In the present case, there was no agreement that appellant should pay \$20,000 for the property in any event. The price was fixed at \$20,000, and was to be paid, as already stated, by the assumption of local improvement liens, the assumption of mortgages, the conveyance of a lot, and the balance in cash. There is nothing in the contract of sale, or in the evidence, which would indicate that appellant, in meeting the incumbrances, was acting as the agent of his vendor. In

addition to this, it may be noted that the respondent, while upon the witness stand, expressly testified that appellant was not his agent.

Upon the issue raised by the cross-complaint, it need only be stated that, after a careful consideration of the evidence, we are of the opinion that the respondent was not entitled to prevail upon that issue.

The judgment will be reversed, and the cause remanded with directions to the superior court to dismiss the action.

MORRIS, C. J., HOLCOMB, PARKER, and BAUSMAN, JJ.,
concur.

[No. 13413. Department Two. October 9, 1916.]

MARIE VILLA, *Appellant*, v. HOWARD R. KEYLOR *et al.*,
Respondents.¹

WATERS AND WATER COURSES—RIPARIAN RIGHTS—APPROPRIATION—
PRESCRIPTIVE RIGHTS. Upon a controversy as to the riparian right to the waters of a creek for irrigation, under a deed as to which there was room for a difference of opinion as to the amount of water granted, a continued mutual diversion by both parties for a period of twenty years of a certain proportion of the water becomes determinative of their rights, although there may have been no express agreement to that effect.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered July 21, 1915, in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

Frank B. Sharpstein, for appellant.

Everett J. Smith, Francis A. Garrecht, Evans & Watson,
Thomas H. Brents, and John F. Watson, for respondents.

PARKER, J.—The plaintiff, Marie Villa, the owner of land riparian to Ritz creek, a small stream with a limited quantity of water, in Walla Walla county, seeks to have defend-

¹Reported in 160 Pac. 297.

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ants enjoined from diverting the water of that creek above her land, which she claims they are unlawfully doing to her damage; and also prays that the amount of the water of the creek which she and each of the defendants is lawfully entitled to be finally adjudicated in this action. Trial in the superior court resulted in a decree determining the proportionate amount of the water of the creek each of the parties is entitled to, which in effect awards the water to each of them in substantially the same proportion that it has for many years past been diverted and used by them. From this disposition of the case, the plaintiff has appealed to this court.

Appellant claims that she is entitled to one-half of the water of the creek, while the decree awards to her a less proportion thereof. Her claim to one-half of the water is rested upon a deed executed by Alexander Blackhall in 1878, conveying her land here involved to her deceased husband, to whose interest she has succeeded by his will. This deed describes the easterly boundary of her land as running northerly "to the center of the south channel of Ritz creek," and describes the northerly boundary thereof as running "thence westerly following the said south channel of Ritz creek." The north channel of the creek does not touch the land conveyed by this deed. The concluding words of the deed grant to Villa "the privilege of diverting one-half of the water of said creek for irrigation." When this deed was executed by Blackhall, he was the owner of the entire quarter section in which the land and water right conveyed to Villa lay. This quarter section, viewed as a whole, is riparian to both channels of the creek, both above and below the land conveyed to Villa, though the land conveyed to Villa, viewed as a separate tract, is riparian only to the south channel of the creek. At that time defendant Catherine J. Ritz owned forty acres of land riparian to the creek in the adjoining quarter section below, in connection with which she had acquired by appropriation the right to a considerable portion of the water of

the creek as against the owner of the Blackhall quarter section, such appropriation right apparently having been acquired while that quarter section was government land. We notice these quoted words of the Blackhall deed to Villa, the fact that the north branch of the creek does not touch the land conveyed by Blackhall to Villa, and the then acquired appropriation right of Catherine J. Ritz in connection with her forty acres below, not with a view of determining what the appropriation rights of Catherine J. Ritz and the granted rights of Villa might be under these rights alone, but for the purpose of showing that there is room for difference of opinion as to the extent of the water right thus granted by Blackhall to Villa; that is, as to whether Villa acquired by that conveyance only half the water of the south channel or half the water of both channels of the creek. These facts would seem to furnish a reason for the subsequent actions of the parties, which the trial court regarded as controlling their present water rights.

The evidence, we think, warrants the conclusion that, for a period of some twenty years prior to the commencement of this action, each of the parties diverted from the creek and used upon their respective tracts of land substantially the same proportionate amount of the water of the creek as is awarded to them by the decree in this action. The theory upon which the trial court so apportioned the water was that this continued use of the water by mutual consent ripened into a binding agreement between them as to the apportionment of the water, though there may not have been an express agreement between them to that effect. That such a continued mutual diversion and use of all the water for such a period of time would become determinative of the rights of the parties touching the apportionment of the water seems plain as a matter of law, especially when such apportionment seems equitable, as it does in this case. Therefore, as we view the controversy, there is involved only the question of fact as to such continued mutual diversion and use of the water. The

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evidence is somewhat voluminous touching this question and is also somewhat conflicting. We have read it all with care, as presented to us in the abstracts prepared by counsel, and are led to the view that it warrants the conclusion reached by the trial court. Upon the whole record, we are of the opinion that we would not be warranted in disturbing the apportionment of the water as decreed by the trial court, who heard and saw the numerous witnesses upon the trial. We think that it would result to no useful purpose to analyze the evidence in detail in this opinion.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, MAIN, and BAUSMAN, JJ., concur.

[No. 13442. Department Two. October 9, 1916.]

CATHERINE MACDERMID, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.¹

MUNICIPAL CORPORATIONS — STREETS — DEFECTIVE SIDEWALKS — NOTICE. In an action for injuries sustained by stepping upon a loose plank in a sidewalk, evidence that notice of the defect had been given to a person in charge of a nearby municipal bath plant, under the board of park commissioners, is inadmissible to show notice to the city, where the streets were in charge of the board of public works.

SAME — STREETS — DEFECTIVE SIDEWALKS — ACTIONS — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. In an action for personal injuries sustained by stepping upon a loose plank in a sidewalk, in which the city pleaded contributory negligence, the same becomes an issue from the evidence of the plaintiff in detailing the circumstances, and properly the subject of an instruction to the jury.

TRIAL — INSTRUCTIONS — ASSUMPTION OF FACTS. In an action for personal injuries sustained by stepping on a loose plank in a sidewalk, an instruction "if you think the plaintiff was negligent herself" etc. is not an assumption by the court, but a submission of the fact to the jury.

SAME — STREETS — ACTIONS — DEGREE OF CARE — INSTRUCTIONS. In such an action, an instruction that remote localities in a suburb do

¹Reported in 160 Pac. 290.

not require the same degree of care as where travel is frequent is not prejudicial, when taken in connection with proper instructions as to the care imposed by law in maintaining streets in proportion to the danger to be apprehended in view of the circumstances and surroundings.

TRIAL—RECEPTION OF EVIDENCE—OFFER OF PROOF. It is not error to refuse to exclude the jury while appellant was making an offer of proof, upon a favorable fact, even though followed by an admonition to disregard it.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 7, 1916, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries caused by a defective sidewalk. Affirmed.

James Kiefer, for appellant. -

Hugh M. Caldwell and *Frank S. Griffith*, for respondent.

MORRIS, C. J.—Appellant, claiming to have received an injury caused by a defective sidewalk, sued the city. The cause was submitted to a jury, and verdict returned for the city, upon which judgment was entered and this appeal taken.

The place of the injury was on Alki avenue near the municipal bathing beach. At this point Alki avenue is about fifteen feet above the beach, and is reached by a flight of stairs. Appellant, coming up the stairs from the beach to the avenue, claims that, as she reached the sidewalk on the avenue, she stepped upon a loose plank which flew up, catching her foot, and resulting in a sprained ankle.

The first error alleged is in the exclusion of evidence. Appellant sought to show both actual and constructive notice. In order to show actual notice, appellant offered to prove that, four days before her accident, a lady, in stepping from the sidewalk to the head of the stairs at the same point, noticed the loose plank and telephoned a person in charge of the municipal bath house of the condition of the walk. The offer was rejected. The ruling was correct. The streets of Seattle are in charge of the board of public works. The bathing beach and bath house are under the supervision of the board

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of park commissioners. Actual notice to the board of park commissioners is not notice to the board of public works. In order to charge a city with actual notice, such notice must be brought home to some officer or person who is in some way charged with the duty of maintaining the streets in proper condition. No complaint is made but that the case was properly submitted to the jury upon the question of constructive notice.

The next contention is that the court erred in instructing the jury that,

"Under the law nobody can come into court pleading carelessness of the opposite party, if the carelessness of the complaining party is the contributory cause of the injury, and if you think from any evidence in this case that the plaintiff was negligent herself, and her own carelessness in walking, in stepping on this sidewalk was the contributory cause of the accident without which it could not have occurred, of course, she could not recover."

It is argued there was no evidence upon which to submit the question of contributory negligence to the jury. The city pleaded contributory negligence as a defense, and being so pleaded it was an issue in the case to be determined by the jury as they believed the fact, either from affirmative proof on the part of the city, or from the evidence of appellant herself in detailing the circumstances which she claimed resulted in her injury. Being an issue of fact, it was for the jury to determine under proper instructions. The question was fairly submitted to the jury in this and other parts of the charge not quoted.

The instruction is further criticized because it is said it assumes contributory negligence. We do not so read it. The language of the instruction is, "If you think from any evidence in this case that the plaintiff was negligent herself," etc. This was a submission of the fact to the jury, and not an assumption by the court.

The third claim of error is that the court erred in using this language in an instruction:

"In a remote locality, a suburb of the city, where the highway is seldom or infrequently used, the same degree of care would not be expected, as in a locality where crowds assemble and where travel is frequent."

This is only part of an instruction in which the court charged the jury that the degree of care imposed by law on the city in maintaining its streets was in proportion to the danger to be apprehended from the use of the streets, and that in determining such question the circumstances and surroundings with regard to the place of accident should be taken into consideration. Reading this instruction as a whole, we see no fault in it.

The last error charged is that the court refused to exclude the jury when appellant was making her offer of proof outlined in the first claim of error. We see no error here. It could not be prejudicial to appellant to have the jury hear an offer of testimony she regarded as valuable to her recovery, even though such testimony was excluded. The ruling thereon was one of law and not one of fact, and it is difficult to see how an offer of testimony upon a favorable fact getting before the jury, even though followed by an admonition to disregard it, could prejudice the party offering to prove it.

The judgment is affirmed.

HOLCOMB, MAIN, PARKER, and BAUSMAN, JJ., concur

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[No. 12993. Department One. October 11, 1916.]

GEORGE JACOBS *et al.*, *Appellants*, v. THE CITY OF SEATTLE,
Respondent.¹

APPEAL—RECORD—SUFFICIENCY. The opening statement of counsel, containing admissions on which the defendants had first moved for judgment, is immaterial, and need not be brought up on appeal, where defendants were allowed to withdraw their answer and file a demurrer to the complaint, which was sustained and the action dismissed.

EMINENT DOMAIN—TAKING OR "DAMAGING" OF PRIVATE PROPERTY—COMPENSATION—GARBAGE PLANTS. The erection and maintenance by a city of an incinerator for the burning of garbage on land adjacent to that of a private owner in such manner as to deprecate the value of his land and render it a menace to health, constitutes a "damaging of private property for a public use," within Const., art. 1, § 16, forbidding such damaging without first making compensation therefor, when the damage did not result from any negligence of the city, even though the operation of such a plant is a proper governmental function granted by legislative act.

SAME—"DAMAGING PROPERTY"—MUNICIPAL CORPORATIONS—NUISANCE—LIABILITY FOR NEGLIGENCE. Rem. 1915 Code, § 8005, authorizing the installation of plants for the disposal of garbage and Id., § 8311, providing that nothing done or maintained under the express authority of statute can be deemed a nuisance, does not defeat recovery for damaging private property without just compensation by the erection and maintenance of a garbage plant, although the city is not liable on the theory of tort for negligent operation in such manner as to create a nuisance.

Appeal from a judgment of the superior court for King county, Humphries, J., entered April 3, 1915, upon sustaining a demurrer to the complaint, dismissing an action in tort, tried to the court and a jury. Reversed.

Jay C. Allen, for appellants.

James E. Bradford and *William B. Allison*, for respondent.

FULLERTON, J.—This is an action by George Jacobs and Theresa Jacobs, his wife, against the city of Seattle for dam-

¹Reported in 160 Pac. 299.

ages to their residence property by reason of the construction and operation on an adjoining lot of an incinerator for the purpose of burning and destroying city garbage. The appeal is based upon the alleged error of the court in sustaining a demurrer to the complaint, and in entering judgment dismissing the action on plaintiffs' refusal to amend.

The respondent interposes a motion to dismiss the appeal because the record does not disclose the opening statement made by counsel for appellants. This is thought to be material because of the admissions therein contained on which the respondent moved for judgment. It appears, however, that the respondent had answered to the complaint, and on the court's intimation that a demurrer to the complaint would be the better method of attack, the respondent obtained leave to withdraw the answer and file a demurrer to the complaint. It is sufficient answer to the motion to dismiss to say that the preliminary proceedings were merged in the final attack presented by way of demurrer, and that the appeal is from the order of the court on the demurrer. The record is ample for the presentation of the sufficiency of the complaint, which is the sole question before us. The motion is denied.

The complaint, for a first cause of action, alleged that appellants are the owners of lot 3, block 4, McNaught's Third addition to the city of Seattle, Washington; that respondent, prior to the 5th day of May, 1913, installed upon property abutting and adjoining appellants' lot on the south an incinerator for the purpose of burning up and disposing of the garbage and refuse of the respondent city, which are brought to said incinerator from different portions of the city in open wagons; that the wagons pass alongside of appellants' property and frequently stand along its east line; that such wagons give forth noxious odors and are disgusting and sickening to the sight and senses; that said refuse and garbage are burned in said incinerator, by reason of which smoke, steam and vapors arise and permeate the air, noxious to the smell and other senses, which said odors are sickening, dis-

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gusting and unbearable, and tend to, and will, cause sickness and disease to those forced to smell and inhale the same; that, from such incinerated garbage and refuse, ashes and unburnt portions are carried out and dumped in close proximity to appellants' home; that the said refuse is composed mainly of decomposed and partly burned matter, which emits strong, disagreeable and noxious odors, detrimental to the health, peace and comfort of appellants and of any one living or being upon appellants' property; that, during the process of incineration, a large amount of cinders and ashes is carried up into the air and precipitated upon the property of appellants, covering appellants' home and yard and surrounding property; that by reason of the operation of said incinerator, flies congregate in great numbers upon and about appellants' home and in and about their house and other houses which they have upon said property, thereby breeding disease and filth and rendering the occupancy of appellants' property disagreeable to the senses and dangerous to health; that respondent maintains an inclined roadway leading from said incinerator and alongside of appellants' property, which is unsightly and unseemly, and which lessens the value of their property; that at no time has respondent ever condemned the property of appellants, nor brought suit to fix the damage thereto, because of the erection, maintenance and operation of said incinerator, but has installed same without paying, or having first fixed and ascertained by a jury, the damages to appellants; that by reason of the facts and conduct and uses aforesaid, appellants have been greatly damaged, and the value of their property has been, and is constantly being, lessened, and will permanently continue to be lessened, to their damage in the sum of \$7,000.

For a second cause of action, it is alleged that the incinerator is negligently and carelessly maintained; that it constitutes a nuisance; that by reason of its maintenance large quantities of garbage, rubbish, refuse and trash are carried to, and burned in, said incinerator, causing a large amount

of cinders, ashes, and dust, disagreeable and noxious odors, stench and gases to arise therefrom and permeate the atmosphere in the vicinity of appellants' premises to such an extent as to be a menace and danger to the health of appellants and to persons occupying their property; that respondent carelessly causes and permits a large amount of ashes, cinders and debris and partially burned animal matter to accumulate around said incinerator, and to be blown and carried over appellants' property, causing it to be covered with cinders, ashes and dust; that respondent has built an inclined roadway alongside appellants' property, leading from the ground up into said incinerator, over which is being hauled garbage, refuse, ashes and debris, from which noxious and vexatious odors arise, and which is unsightly and detrimental to the property of appellants; that appellants have upon their property three houses for rental purposes, from which they might derive an income, but that they are untenanted and uninhabitable, and appellants are, and will, be unable to derive any income therefrom; that said damage is a continuing one, and the value of their property has been greatly injured, lessened and destroyed. They further allege that, on May 5, 1913, within thirty days after said damages first accrued, they presented their claims in writing to the respondent city, and again on April 2, 1914, presented a further and additional claim, both of which the city disallowed. Appellants demanded judgment for \$7,000.

The first cause of action is based upon the guaranty of art. 1, § 16, of the state constitution, which provides that no property shall be taken or damaged for public or private use without just compensation. The second cause of action is based upon the negligent operation of the incinerator plant in a manner which causes it to be a nuisance. Respondent's attack on the sufficiency of the complaint is founded on its contention that the city in the disposal of garbage is discharging a governmental as distinguished from a corporate duty, and hence would not be liable for resulting damages of

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any character. The only question for determination is, Does the complaint state a cause of action on either count?

It may be conceded that the construction and operation of an incinerator by the city of Seattle for the disposal of garbage was a lawful exercise of municipal power under the delegation of authority granted by virtue of state legislation. But the lawfulness of the power would not warrant its exercise in such a way as to breach any constitutional guaranty for the protection of the citizen. The disposal of garbage may be a proper governmental function, granted by legislative enactment; but, conceding it to be so, the function must be exercised with due regard to constitutional limitations. Our constitution (art. 1, § 16) explicitly provides that private property shall not be damaged for public use "without just compensation having been first made, or paid into court for the owner." The complaint in this case sets forth the injury to the property of appellants arising from the erection, maintenance and operation of respondent's plant for the disposal of garbage on land adjoining that of the appellants, and "that at no time has said city ever condemned plaintiffs' property nor has it ever brought any suit to establish or fix the damage to plaintiffs' property because of the erection, maintenance and operation of said incinerator, but said city has, without paying to plaintiffs, or having first fixed and ascertained by a jury, plaintiffs' damage," so installed and operated said incinerator as to menace and depreciate the value of their property. The complaint does not seek to charge negligence of the respondent or its employees in the performance of governmental duties, in which case the municipality might be absolved from liability. The first cause of action is founded on the higher ground of the taking or injury to property without just compensation. The authorities sustain the right of recovery in such cases.

The case of *Hines v. Rocky Mount*, 162 N. C. 409, 78 S. E. 510, Ann. Cas. 1915A 132, L. R. A. 1915C 751, which was an action involving the disposal of garbage, after con-

ceding the rule of nonliability of municipalities for negligence in the performance of governmental duties, said:

"This general principle is subject to the limitation that neither a municipal corporation nor other governmental agency is allowed to establish and maintain a nuisance, causing appreciable damage to the property of a private owner, without being liable for it. To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land."

In *Louisville v. Hehemann*, 161 Ky. 523, 171 S. W. 165, L. R. A. 1915C 747, another garbage case, which concedes the nonliability for the negligence of city employees, it is said:

"But there is an element of wrong complained of in this case which goes beyond that. Conceding that a city dump is necessary for the public good, and that Cabel street was the proper place for it, still the city had no right to take or injure adjacent private property or the occupants in the use thereof without making compensation."

In *Kobbe v. New Brighton*, 20 Misc. Rep. 477, 45 N. Y. Supp. 777, a garbage incinerator case, it is said:

"The constitutional prohibitions against depriving any person of his property without due process of law, or without just compensation, may be violated without the physical taking of property. They extend to every act which injuriously affects property rights. . . . If, therefore, it be true that such a cremator as this statute authorizes is, like a pesthouse, necessarily offensive, and a direct injury to neighboring real property, though conducted in the most careful and scientific manner, the authorization of it by the legislature without providing for compensation for such injury, could not legalize it as against individuals thus damaged in their property."

See, also, *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *McLaughlin v. Hope*, 107 Ark. 442, 155 S. W. 910, 47 L. R. A. (N. S.) 137.

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The Federal constitution and many of the state constitutions are without provision respecting the necessity of compensation for the "damaging" of private property by means of a public use; the constitutional inhibition extending only to the "taking" of private property without compensation. But the courts in the most of those states, however, hold that such an injury as in the case at bar is a "taking" of private property, and apply the same principle of necessity of compensation. We cite a number of them, most of them involving an injury to property arising from the disposal of sewage by municipalities. See: *Pumpelly v. Green Bay Co.*, 80 U. S. 166; *Seifert v. Brooklyn*, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664; *Sammons v. Gloversville*, 175 N. Y. 346, 67 N. E. 622; *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 77 Am. St. 335, 48 L. R. A. 691; *Attorney General v. Grand Rapids*, 175 Mich. 503, 141 N. W. 890, Ann. Cas. 1915 A 968, 50 L. R. A. (N. S.) 473; *Donnell v. Greensboro*, 164 N. C. 330, 80 S. E. 377; *Parrish v. Town of Yorkville*, 96 S. C. 24, 79 S. E. 635, L. R. A. 1915A 282.

From the foregoing authorities it is clear that the erection and maintenance by a city of an incinerator for the burning of garbage on land adjacent to that of a private owner, and its operation so as to depreciate the value of his land and render it a menace to the health of himself and family, constitutes a damaging of private property for a public use, for which he would be entitled to compensation under the terms of Const., art. 1, § 16. The allegations in the first count of appellants' complaint set forth facts sufficient to bring it within the operation of this principle, and therefore state a cause of action as against a general demurrer.

Respecting appellants' second cause of action, we are of the opinion that the demurrer thereto was properly sustained. This cause is based on the theory of the negligent operation of the garbage plant in such a manner as to create a nuisance. There is a respectable line of authorities permitting the right of recovery in such cases. See: *Fort Worth v. Crawford*,

74 Tex. 404, 12 S. W. 52, 15 Am. St. 840; *Stephenville v. Bower*, 29 Tex. Civ. App. 384, 68 S. W. 833; *Haskell v. Webb* (Tex. Civ. App.), 140 S. W. 127; *New Albany v. Slider*, 21 Ind. App. 392, 52 N. E. 626; *Newcastle v. Harvey*, 54 Ind. App. 243, 102 N. E. 878; *Hines v. Nevada*, 150 Iowa 620, 130 N. W. 181, 32 L. R. A. (N. S.) 797; *Brayton v. Fall River*, 113 Mass. 218, 18 Am. Rep. 470.

We think, however, under the statutes of this state, the proper theory of recovery is set forth in appellants' first cause of action. The two causes of action in reality seek the same damages for the same injury, and to uphold one cause necessarily excludes the other.

The installation of plants for the disposal of garbage is authorized by Rem. 1915 Code, § 8005. The code also provides:

"Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Rem. 1915 Code, § 8311.

The construction of a garbage incinerator being authorized by law, its maintenance in a proper manner and place would not constitute a nuisance in a legal sense. But such a conclusion does not defeat appellants' right of recovery for the damaging of his property without just compensation. The denial of the right to recover damages for an injury on the theory of its constituting a tort, such as is the basis of the second cause of action, does not militate against the right of recovery for a taking or damaging of property for a public use without compensation. The principle upon which we rest appellants' right of recovery is well expressed in *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154, 77 Am. St. 335, 48 L. R. A. 691, as follows:

"But if, for the purpose of this case, we concede the defendant's claim that the use is a governmental use, it is nevertheless liable to the plaintiff. The injury described by the complaint is not a mere consequential damage, like that resulting wholly from the lawful use of one's own property, or

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the lawful exercise of governmental power; it is a direct appropriation of well recognized property rights within the guaranty of the constitution. . . . Public necessity may justify the taking, but cannot justify the taking without compensation. . . . The mandate of the constitution is intended to express a universally accepted principle of justice, and should receive a construction in accordance with that principle, broad enough to enable the court to protect every person in the rights of property thus secured by fundamental law."

The judgment sustaining the demurrer is reversed as to the first cause of action, and the cause remanded with leave to the defendant to answer.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 13500. Department Two. October 13, 1916.]

ANDY JIM, *Appellant*, v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, *Respondent*.¹

APPEAL—REVIEW—DISMISSAL ON MERITS—QUESTION OF FACT. Upon a trial before the court without a jury, a judgment of dismissal upon a challenge to the sufficiency of the evidence is a decision on the merits, presenting on appeal a question of fact for ultimate determination by the court, and not the question presented upon granting a nonsuit at a jury trial.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—FAILURE TO WARN—EXPLOSIVES—EVIDENCE—SUFFICIENCY. Where a workman, twenty-one years old, was injured by the explosion of a dynamite cap which he had placed in his pocket by direction of the foreman and had forgotten to remove, the supreme court will not disturb a finding that the foreman was not guilty of negligence in failing to instruct him as to the danger of handling dynamite caps and in failing to see that unused caps were returned to their place, in view of the workman's age, education, apparent intelligence and experience, as the trial court had opportunity to judge.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 8, 1915, dismissing

¹Reported in 160 Pac. 295.

with prejudice an action for personal injuries, upon sustaining a challenge to the sufficiency of the evidence, after a trial to the court on the merits. Affirmed.

Glen V. Farnham and *C. H. White*, for appellant.

Geo. W. Korte and *Cullen, Lee & Matthews*, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries resulting from the explosion of a dynamite cap, the proximate cause of which plaintiff claims was the negligence of one of defendant's section foremen under whom he was at the time working. The case proceeded to trial in the superior court for Spokane county without a jury. At the close of the evidence introduced in behalf of the plaintiff, counsel for the defendant, challenging the sufficiency of the evidence to entitle the plaintiff to recover, moved for judgment, which motion was by the court granted, rendering judgment of dismissal with prejudice. From this disposition of the case, the plaintiff has appealed to this court.

Appellant is a Bulgarian unable to speak the English language, but evidently fairly well educated, having attended school for many years in Bulgaria before coming to this country. At the time of receiving the injury here in question, he was twenty-one years old. He had then been working for respondent upon its railway line for about two months as a section hand. On October 31, 1914, it became necessary to remove a large boulder from near appellant's track upon its right of way. The boulder was too large to move without breaking it, which had to be done by an explosion of dynamite. The respondent's section foreman in charge of the work directed appellant to go with him some little distance along the track to get some dynamite and a dynamite cap. The foreman took some dynamite, directing appellant to bring a cap. They returned to the rock, the foreman carrying the dynamite and appellant the cap. They then

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attempted to set off the charge of dynamite with the view of breaking the rock, but for some reason it failed to go off. They then brought more dynamite and another cap, the foreman carrying the dynamite and the appellant the cap as before. Their efforts to set off the charge of dynamite upon their return at this time also failed. It was raining at the time and appellant's story seems to indicate that their failures were because of the caps getting wet while he was carrying them to the rock. He was then directed by the foreman to bring more caps from the hand car and to bring them in his pocket in order that they could be kept dry. Complying with this direction, he brought two caps in his pocket. One of these was successfully used in exploding the dynamite and in breaking the rock. The other cap evidently remained in appellant's pocket, though there is no direct evidence to that effect. He had never seen dynamite or dynamite caps until that time. His story furnishes us practically no information as to whether or not he had any appreciation of the dangers of dynamite or dynamite caps. The foreman did not caution him or give him any instructions as to the care he should exercise in handling the caps.

Two days later, while performing his usual duties as section hand under the same foreman, appellant put his hand into the same pocket of his coat in which he had carried the two caps to the boulder, for the purpose of getting his gloves out, and while his hand was in his pocket in the act of withdrawing his gloves, there was an explosion in the same pocket, resulting in serious injury to his hand, for which he claims damages. There was found there, as evidently having dropped out of his pocket, a piece of a dynamite cap, and some small pieces of copper from such a cap were also found in the wound inflicted upon his hand by the explosion. The evidence seems to warrant the conclusion that this explosion was from the cap which appellant had put in his pocket and not used two days previous, though this is to be arrived at by inference rather than by direct evidence of such fact. We

shall assume, as his counsel does, that it was the same cap and that he had forgotten to put it back after the breaking of the rock by exploding the dynamite with the other cap.

There are no remarks of the trial judge or recitals in the judgment in the record before us showing the ground upon which the trial court granted the motion for judgment. We assume, therefore, that it was granted upon the ground stated by counsel for respondent in making the motion, which was that there was "no showing as to any acts upon the part of the defendant, or any of its agents or servants, which caused the injury complained of, or contributed thereto." There is nothing in the record indicating that the question of assumption of risk or contributory negligence on the part of appellant entered into the question of respondent being entitled to judgment. We have to do then with the correctness of the trial court's decision in holding that respondent was not negligent.

We are to be reminded that this is not a question of non-suit at the close of plaintiff's evidence upon a jury trial; hence our problem is not whether the evidence was sufficient to carry the case to the jury, had it been tried before a jury, but whether or not the trial court correctly decided the case upon the merits as a question of fact; for the court's decision was in effect a decision upon the merits of appellant's entire case, though made in response to a motion for judgment against appellant made at the close of the evidence introduced in his behalf.

The only negligence which it would be at all possible to charge respondent with in this case was that of the failure of its section foreman to instruct appellant as to the dangers incident to handling the dynamite caps and see that he returned the unused cap instead of letting it remain in his pocket. Now it might well be argued that it would have been error in the trial court to take this question of negligence from the jury had the case been tried before a jury. But whether it constitutes negligence such as to entitle appellant

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to judgment upon a trial before the court, is quite a different question, and being so tried, became a question of fact for ultimate determination by the court, the same as it would have been determinable by a jury had the case been tried before a jury. Clearly, under all the circumstances here shown, we would not be warranted in disturbing the verdict of a jury rendered against appellant upon these facts. While cases tried in the superior court are in a sense triable *de novo* in this court, and we are not bound by the findings of the trial court to the same extent that we are by the findings of a jury, we cannot see our way clear to disturb the findings of the trial court made against appellant in this case. Considering the age, education and apparent intelligence and experience of appellant, as the trial court had opportunity to judge, we cannot say that it erroneously determined that respondent's section foreman was not guilty of negligence in his failure to instruct appellant as to the danger of handling dynamite caps, and in the foreman's failure to see that appellant returned the unused cap immediately following the breaking of the rock when the other cap was used. The question is, in its last analysis, one of fact, the same as if the case had been tried before a jury, though the trial court's conclusions on questions of fact are not as binding on us as the finding of a jury. We cannot say that the evidence does not preponderate in support of the trial court's conclusion.

The judgment is affirmed.

MORRIS, C. J., HOLCOMB, and MAIN, JJ., concur.

[No. 12753. Department One. October 17, 1916.]

**T. F. PETERMAN, as *Peterman Manufacturing Company,*
Respondent, v. ANNA MARIA GOSS *et al., Appellants.*¹**

CONTRACTS—BUILDING CONTRACTS—PROVISION FOR ARBITRATION AND NOTICE—"OTHER CONTRACTORS." The disputes of a general contractor with his materialmen and subcontractors are not submitted to the arbitration of the architects by a contract for the construction of a school building reciting that the heating, plumbing, electric work, painting and general excavation will be let in separate contracts and not included in the general contract, and providing that the general contractors shall allow space to contractors for parts of the work not included in the general contract and that the contractors are to work in harmony and their differences settled by the architects, where the clause in question provided that, should any contractor or subcontractor claim damages on account of the delay or negligence of other contractors, he must give written notice of the claim to the architects for adjustment etc.; since the same has application only to "other contractors" "not included in the general contract," and hence does not require notice of claim for damages by the general contractor on account of the delay of a subcontractor furnishing him mill work on the general contract.

SAME — PERFORMANCE OR BREACH — DELAY — DAMAGES — OFFSET—OVERHEAD CHARGES. In a subcontractor's action against a contractor, overhead charges for salaries during the period of delay through plaintiff's failure to perform on time will not be allowed as a set-off, where it appears that the general contractor's other work was not finished during that time and that the overhead charges would have been continued and incurred in any event.

SAME—PERFORMANCE OR BREACH—DELAY—DAMAGES — EVIDENCE — SUFFICIENCY. The conclusion of witnesses that there was a twenty-five per cent loss in efficiency in installing mill work in a school building through delay in furnishing the mill work is not warranted by the fact that ten to fifteen carpenters were laid off at various times by reason of the delay, it appearing that the contractor was not put to the expense of carrying the carpenters when laid off.

SAME—PERFORMANCE OR BREACH—DAMAGES—OFFSET. The cost of handling and refinishing defective mill work rejected by the inspectors, is a proper element of damages to be offset against the claim of a subcontractor furnishing the mill work.

¹Reported in 160 Pac. 432.

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Opinion Per Curiam.

SAME—PERFORMANCE OR BREACH — DELAY — DAMAGES — INTEREST.
Interest on money borrowed by a contractor during the time his work was held up by the delay of a subcontractor is a proper element of damages to be offset against the subcontractor's claim.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered October 22, 1914, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Reversed.

Fogg & Fogg, for appellants.

John E. Gallagher, for respondent.

PER CURIAM.—Tacoma School District No. 10, on September 9, 1912, let to F. H. Goss the general contract for the construction of the Central School building, in the city of Tacoma. This contract required the building to be completed by July 15, 1913. The contracts for excavation, heating, plumbing, electric work and painting were let to other contractors. Goss' contract contained the following provisions:

"(1) *Contractor.* The contractor is to provide all materials and labor necessary for the complete and substantial execution of everything described, shown or reasonably implied in the drawings and specifications for his part of the work, including all transportation, scaffolding, apparatus and tools necessary for the same. All materials shall be the best of their respective kind, and all workmanship shall be of the best quality.

"(2) *Other Contractors.* The general contractor shall allow the contractors for parts of the work not included in his contract proper room for the storage of their materials and the execution of their work. The contractors shall work in harmony. The architects and superintendent will settle all differences arising, and their advice and orders shall be binding and final. Each contractor is to carefully read all of the specifications, so as to better understand his part of the work. The contractors are to carry on their work at all times with the greatest reasonable rapidity under the direction and to the satisfaction of the architects, superintendent and owner.

"(3) *Interpretation of Drawings.* In the event of any doubt or question arising respecting the true meaning of the drawings or specifications, reference shall be made to the architects, whose decision shall be final and conclusive.

"(4) *Damages Claimed for Delays by Other Contractors.* Should any contractor or subcontractor claim damages on account of the delay, negligence or carelessness of other contractors, or for any other cause, he must declare the amount of such damages and make claim for same in writing at the time the damage is incurred. He shall deliver such written claim to the architects or superintendent and to the party at fault, within 48 hours of the occurrence, that such claim may be adjusted by the architects or superintendent. Failure to act as provided above will render such claim null and void.

"(5) The heating, plumbing, electric work, painting and general excavation will be let in separate contracts, and are not included in the general contract."

On November 4, 1912, Goss entered into a subcontract with the Peterman Manufacturing Company to supply the necessary mill work for the building. This contract was as follows:

"Contract for Millwork for Central School.

"Tacoma, Washington, Nov. 4th, 1912.

"We propose to furnish you all the mill work to be used in the construction of the new Central school building situated on South G street between South 7th and South 8th, in the city of Tacoma, according to plans, specifications and details prepared by the architects, Heath & Gove, for the sum of eight thousand seven hundred dollars (\$8,700), delivered to the building site.

"Delivery.

"We agree to keep in touch with the contractor of this building and furnish said mill work when needed and in such a manner so as not to detain the progress of the building.

"Terms.

"Eighty per cent to be paid upon delivery of material, on or before the 10th of each month for all material delivered during the preceding month, and the remaining 20 per cent to be paid when building is completed and mill work accepted by architects. (Said 80 per cent to be paid upon approval of mill work by the architects.)

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"We agree to make good any defects in material or workmanship for a period of six months after final acceptance by the architects as required by the specifications.

"It is further understood that we have read all the general conditions of the architects' specifications, and the specifications connected with our portion of the work, and this bid and agreement is made in accordance therewith."

The subcontractor began furnishing mill work on December 5, 1912, and continued to do so until November 8, 1913. The building was ready for the interior finish on April 30, 1913, and the subcontractor began supplying material therefor on May 1, 1913. From this date until September 11, 1913, constant protests were made by the contractor against the delay in furnishing mill work. On February 10, 1913, the Peterman Company was paid \$938 on account, and on June 28, 1913, was paid \$2,000 on a bill rendered for \$4,000. F. H. Goss having died, his widow was appointed executrix and proceeded with the contract. On her refusal to pay the balance of the contract price in the sum of \$5,762, together with a claim of \$721 for extras, the Peterman Manufacturing Company brought suit for \$6,483 against the executrix and the sureties upon the contractor's bond. The defendants set up a counterclaim for damages in the sum of \$549.83 for material the plaintiff had neglected to supply and which was procured at the contractor's expense; \$913 for expense of handling and refinishing defective mill work; \$1,120 for overhead expenses for seventy days' delay; \$1,412.50 for twenty-five per cent loss in erection efficiency and expense, due to delay on the part of the subcontractor; and \$122.50 for interest paid on money borrowed by reason of the plaintiff's delay. The action was tried by the court, which reduced plaintiff's claim for extras to \$389.50, and reduced defendants' set-off for plaintiff's failure to furnish items called for by the contract to \$440.83. The balance of plaintiff's contract price was allowed in full, and judgment given for plaintiff in the sum of \$5,710.67. The defendants appeal.

The only question involved on this appeal is the right of appellants to set off the items of \$913, \$1,120, \$1,412.50, and \$122.50, set out above.

In its memorandum decision the trial court recited that,

"Defendant claims items amounting to \$913 for working over imperfect mill work. The court finds that defendant is not entitled to credit for these. No notice of any such claim was given at the time as required by specifications on page 7."

"Defendant claims that they were damaged by delay on the part of plaintiff in furnishing materials. Items amounting to \$2,654.50. The court finds that plaintiff did occasion considerable delay by not furnishing the mill work as required. However, defendants never gave notice of their claim in this respect as required by the specifications on page 7."

The provision referred to by the court as being on page seven of the specifications is the paragraph numbered (4) which we have quoted from the contract.

Construing the different sections of the specifications together, we think it is plain that the term "other contractors," as used in this section, does not have reference to the subcontractors or materialmen under the general contractor. There were several other contracts on this building "not included in the general contract," such as those for putting in the heating plant, plumbing, electric work, painting and the general excavation. One provision of the specifications is to the effect that "the general contractor shall allow the contractors for parts of the work not included in his contract proper room for the storage of their materials and the execution of their work." Among several contractors on different parts of the work, it is but natural that some conflicts may arise, and with that in view, it was provided that any claims for damages on account of the delay or negligence of any of them must be promptly referred to the architects or superintendent for the purpose of adjustment. Controversies between any of these contractors and their materialmen or laborers were subsidiary matters for which no arbitration was provided in the specifications. If the troubles of any of the contractors

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with their own materialmen should occasion delay in the work of the other contractors, the offending contractor could be brought to book by the arbitrators, but there is nothing in the specifications to indicate an intent that the arbitrators should go beyond the contractors themselves to settle disputes which they might have with materialmen who were in no sense parties to the contracts with the school district. The school district would have no right of action against the materialmen or subcontractors of a contractor. If the contracting parties had intended to refer these subsidiary disputes to the arbitration of the school district's representatives, the specifications should have so declared in express terms and not left the matter to be implied from the chance signification of some term employed. That this was the interpretation of the architect is shown by the fact that he refused to interfere between appellants and respondent, or, as he testified, "between the general contractor and his subcontractors."

We think the trial court was in error in applying this paragraph of the specifications to the subject-matter of the dispute between appellants and respondent. Since it is without application, it was not necessary for appellants to present any written claim declaring the amount of their damages to the architects or superintendent or to the respondent, within forty-eight hours of the occurrence, or at all.

The relations of the appellants and respondent not being governed by the foregoing section of the specifications, it remains to inquire whether appellants' counterclaim is substantiated by the evidence. The appellants make no claim for the \$109.88 worth of material furnished by them and rejected by the court as not properly chargeable against respondent. As to the item of \$913, charged against respondent for the expense of culling, loading and unloading lumber and of labor in resanding and finishing imperfect mill work, the evidence of appellants stands without contradiction that the inspectors for the school district refused a quantity of material furnished by respondent because of lack of finish;

that respondent refused to take most of it back; that appellants were compelled to have it sanded by hand instead of machine sanded, as the specifications required; and that, from the actual time-book kept on that work, the expense of re-sanding was \$700, of culling the lumber, \$150, and of loading and unloading culled lumber, \$63. We think that appellants are entitled to offset the expense of handling and re-finishing defective material in these sums, which aggregate \$918.

As to the items of \$1,120 for overhead expense, twenty-five per cent loss in erection efficiency amounting to \$1,412.50, and interest in the sum of \$122.50 which appellants were required to pay on borrowed money, the evidence is not so satisfactory. While it clearly shows wrongful delay on the respondent's part, the determination of the amount of damages to be allowed therefor presents the difficulty. The item of \$1,120 for overhead charges is made up from the salaries paid the superintendent, manager and general bookkeeper of appellants from July 16 to September 24, 1913, inclusive, the latter being the day on which the building was accepted by the school district. The evidence shows that the brick work was not completed on July 16th, and that the plastering was not fully completed until sometime in November. These were matters requiring the continuance of those general employees in the discharge of their duties, irrespective of the delay in furnishing the mill work, and we do not think it was clearly proved that their continued employment was due to the delay of respondent. The latest complaint of delay in furnishing materials is dated July 19, 1913, with the exception of one on September 11, 1913, concerning glass to be put in the tower, which respondent refused to supply on the theory it was not within his contract. We hold that the item of overhead charges is not a proper subject of set-off against respondent's claim.

The item of \$1,412.50, constituting twenty-five per cent of loss in erection efficiency, is claimed as excess of cost of in-

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stalling the finish, due to the necessity of shifting carpenters from one piece of work to another because of the lack of material for finishing off one room before proceeding to another. The only evidence as to this was the testimony of the Teeters, father and son, who occupied the positions, respectively, of superintendent and carpenter foreman, and seems to have been more in the nature of conclusions of the witnesses. The foreman testified that carpenters were laid off when there was no work, from ten to fifteen being laid off three or four times. The bookkeeper also testified that as many as ten carpenters were laid off at a time, and that carpenters were discharged half a dozen times. The superintendent testified that he could have worked twenty-five carpenters at a time if he had had the material, but that on account of delay in receiving it, he worked but six carpenters. It appears from this evidence that appellants were not put to the expense of carrying the carpenters when there was no work. There was doubtless some loss in the efficiency of the force from being shifted back and forth between the rooms because of the lack of material. But there is no satisfactory evidence as to the amount of such loss. The conclusions of the witnesses are certainly high when they declare that it was one-fourth of the expense of installing the finish. The school district waived its demurrage claim of \$100 per day against the contractor, necessitating the exclusion of that item from consideration.

Respecting the counterclaim of \$122.50 for interest, H. F. Goss testified that it was necessary to borrow money to carry on the work, because his estimates were held up by reason of lack of mill work for the building; that he borrowed \$5,000 on July 26, 1913, and \$4,000 on August 13, 1913, on which interest was paid in the total amount of \$122.50. This evidence is direct and positive and was not contradicted. The evidence further shows that the last estimate allowed and paid prior to final acceptance of the building was on July 4, 1913. The necessity for borrowing this money was due to delay in getting mill work for the interior finish. The con-

tract provided for payment of estimates every two weeks, and the failure to make any estimates between July 4 and September 24, 1913, was due to inability to finish up the interior on account of lack of mill work. We think this interest was a proper element of damage and should have been allowed to appellants.

The judgment will be reversed, with instructions to reduce the judgment in favor of respondent by deducting therefrom the items of \$913 and \$122.50, totaling \$1,035.50. The appellants will recover costs of appeal.

[No. 13004. Department One. October 17, 1916.]

D. C. KESSLER, *Appellant*, v. THE CITY OF SEATTLE *et al.*,
Respondents.¹

MUNICIPAL CORPORATIONS—EMPLOYEES—DISCHARGE—CIVIL SERVICE—CHANGE OF CHARTER. District health and sanitary inspectors not under civil service at the time of their appointment, and continued in the performance of their original duties without further appointing, are not affected by a change in the city charter requiring vacancies to be filled and additional employees to be appointed subject to the civil service.

SAME—EMPLOYEES—DISCHARGE—REDUCING NUMBER—CIVIL SERVICE. A city has power to reduce the number of city employees in the interest of economy, and the courts will not review the appointing power in making a selection among those equally efficient and retaining those longest in service.

JUDGMENT—RES JUDICATA—IDENTITY OF ISSUES. A judgment setting aside a discharge of a qualified sanitary inspector under the civil service while unqualified persons were retained, is not *res judicata* preventing the city from reducing the number of employees by ordinance, in the interest of economy, and the appointing power from making a selection from the qualified persons in service.

Appeal from a judgment of the superior court for King county, Clifford, J., entered February 19, 1915, dismissing an action for the reinstatement of a discharged civil service employee, tried to the court. Affirmed.

¹Reported in 160 Pac. 423.

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Julius L. Baldwin, for appellant.

James E. Bradford and *William B. Allison*, for respondents.

FULLERTON, J.—In December, 1909, the appellant was employed by the city in its health department, being later appointed district sanitary inspector. On August 11, 1913, he was temporarily discharged by the commissioner of health, whereupon he instituted proceedings in the superior court of King county against the commissioner of health and the civil service commission to compel his reinstatement. He was successful in the proceedings and thereafter resumed his duties. Subsequently the city of Seattle enacted an ordinance relating to the health department which reduced the number of district sanitary inspectors to six. This required the suspension of certain of the persons so employed, and the appellant, among others, was separated from the work and placed on the preferred waiting list. He thereupon instituted the present proceeding against the commissioner of health, the civil service commissioners, and the several sanitary inspectors remaining in office, seeking reinstatement and an injunction against his further discharge from the position. A trial was had on the merits of the cause, resulting in a judgment dismissing the proceedings. This appeal followed.

The appellant was appointed to a position in the health department after having taken and passed the city's civil service examination. Certain of the inspectors retained after his second suspension were appointed without such examination. All of them, however, are older in service than is the appellant. It is the appellant's principal contention that the inspectors holding office without taking the civil service examination are holding in violation of the city charter, and hence he could not lawfully be suspended so long as any one of such persons retained his position.

The question presented hinges for its determination upon the charter provisions of the city of Seattle. Prior to March 3, 1908, the charter provided for a board of health, consisting of three physicians to be appointed by the mayor. The board was empowered to appoint and remove at pleasure a health officer, and such other subordinate officers as might from time to time be deemed necessary by the city council. There was no requirement that any of the persons so appointed be subject to the civil service rules. On the date given, the city amended the charter, the principal change being the abolishment of the board of health and vesting its powers in a commissioner of health. By the amendment the commissioner was given supervision and control of all matters pertaining to the "health and sanitation affairs of the city," with power to appoint medical assistants and nurses and fill such vacancies as may "occur in other positions now existing in said department and any additional employees hereafter appointed, . . . such vacancies to be filled and additional employees appointed by the commissioner subject to civil service rules and regulations;" taking away the power to remove at pleasure the employees of the department.

The employees of whom the appellant complains were appointed to their positions prior to the change in the charter. They were continued after the change without further appointment, and are now performing the same duties they were originally appointed to perform, although they were not at first given the specific title of district sanitary inspectors.

It is our opinion that they were legally appointed and are now lawfully in office. It is clear that, under the charter as it existed at the time of their appointment, they were not subject to the civil service regulations. Being lawfully in the service, their position was not affected by the change in the charter. The amendment, neither by express words nor necessary implication, declared the positions vacant. On the contrary, the inference arising from the language used tends to

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the opposite conclusion. The commissioner was only empowered to fill vacancies occurring in the department and appoint additional employees when such should be required, such new appointees only to be selected subject to civil service rules and regulations.

The power of the city council to reduce the number of city employees in the interest of economy cannot be successfully questioned. Where such a reduction is made requiring a dismissal or suspension of some employee, it is not a matter of injustice, requiring correction by the courts, for the appointing power in making a selection among those equally efficient to retain those longest in service.

The appellant further urges that the judgment in the former case is *res judicata* of the question here involved. But without setting out the facts giving rise to the former proceeding, we think it manifest that the two causes are not the same. While the judgment seems to have been rested on the principle that unqualified employees were retained in positions in the service and the appellant, a qualified person, dismissed from a similar service, there is no such showing in this record. Here all of the employees were qualified, the number was reduced by ordinance, and the appellant selected for suspension because of his shorter period of service. No prior judgment of the court not embodying the same facts could be *res judicata* of the question.

The order is affirmed.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 13488. Department One. October 17, 1916.]

JAY P. GRAVES, *Respondent*, v. COLUMBIA UNDERWRITERS,
Appellant.¹

HUSBAND AND WIFE—COMMUNITY PROPERTY—JOINT NOTE—SEPARATE PROPERTY OF WIFE—IMPROVEMENT—COMMUNITY DEBT. Money borrowed by the note of husband and wife, secured by mortgage on his wife's separate property, and used in the payment of taxes and the preservation of such property, is not a community fund, and does not give the community any interest in the land which could be subjected to the lien of a community judgment; in view of Rem. 1915 Code, §§ 5915-5917, defining separate and community property, placing the latter under the control of the husband, and providing that the wife's separate property shall not be subject to the debts or contracts of the husband, but only to her control in the same manner that the husband controls property belonging to him.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered November 12, 1915, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Kenneth Durham, for appellant.

P. F. Quinn, for respondent.

FULLERTON, J.—Bessie Lynch Fife, at the time of her marriage to James H. Fife, was the separate owner of lot 4, block 4, Havermale's addition to Spokane, which property she had inherited from a former husband. On March 1, 1914, the Columbia Underwriters, a corporation, obtained a judgment for \$172.60, with interest and costs, against the community composed of James H. and Bessie Lynch Fife, upon which execution was issued and returned unsatisfied. On February 23, 1915, Bessie Lynch Fife borrowed \$2,100 for the purpose of paying off some \$1,747.39 delinquent and current taxes on lot 4, block 4, Havermale's addition, the property being unproductive and incapable of meeting its tax burdens. The balance of the loan was used in connection with other sepa-

¹Reported in 160 Pac. 436.

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rate property of the wife. A mortgage was given upon the foregoing described lot, husband and wife both joining in the note and mortgage at the request of the person making the loan. On June 14, 1915, Mr. and Mrs. Fife joined in a warranty deed conveying such mortgaged lot to J. P. Graves for a consideration of \$10,000. The purchaser retained \$250 out of the sale price pending the bringing of an action to quiet title against defendant's judgment, which, at the time of sale, amounted to about \$240. The action to quiet title was brought in the name of the purchaser, J. P. Graves, at the expense of James H. and Bessie Lynch Fife, who were stipulated to be the real parties in interest. From a judgment quieting title in J. P. Graves, the Columbia Underwriters appeal.

The appellant contends that the \$2,100 obtained on the note jointly executed by James H. Fife and Bessie Lynch Fife became community property, and the payment of the tax liens with such borrowed money vested the community with an interest in the lot in question, which could be subjected to the rights of an existing judgment creditor. In other words, it is contended that money borrowed on the joint note of husband and wife on the security of her separate property, and designed solely for the protection or improvement of such property, acquires the status of community property by reason of the joinder of the husband in the note and mortgage given for the loan, even though his joinder were unnecessary under the law; and that its investment in the separate property of one spouse is the commingling of a community interest in such property to the extent of subjecting it to liability on the claims of existing judgment creditors of the community.

The separate property of a wife is defined by Rem. 1915 Code, § 5916, as follows:

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts

of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him."

The preceding section of the code, Id., § 5915, after defining the husband's separate property, provides that he may manage and incumber it without the joinder of his wife, as fully and to the same extent as if he were unmarried. Id., § 5917 provides that, "Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property."

Under these sections, we have held that the proceeds of a loan to husband and wife, and property purchased therewith, though the money was borrowed on the security of the separate property of one spouse, would constitute community property. *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398; *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125; *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. 937.

It will be noticed in these cases that the decision is rested on the ground that additional property was acquired with the borrowed money, or that such money was put to other uses for the benefit of the community. The present case is readily distinguishable by reason of the fact that the money was borrowed solely for the purpose of preserving the wife's separate property from loss under tax foreclosure. The statutes give the right to married persons to manage and encumber their separate property as fully as though they were unmarried. It certainly falls within the proper management of one's separate property to take measures against its sequestration for taxes, and the incumbering of one's property to raise money for such a purpose amounts to nothing more. If the money is not devoted to any community purpose, it retains its status as separate property. The joinder of the husband in the note and mortgage on his wife's separate property, an act exacted by the person making the loan in an ex-

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cess of precaution, would not convert the money acquired thereby into a community fund, if it was in no way applied to community uses. We have held in the case of *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088, that the joinder by a husband with his wife in a note and mortgage upon her separate property would not make the property nor the proceeds therefrom community property. While the presumption naturally arises that property acquired during the marital relation is community property, the presumption is a rebuttable one. *Weymouth v. Sawtelle*, 14 Wash. 32, 44 Pac. 109. In the present case, the facts indisputably show that the borrowed money was in no way devoted to a community use, but solely for the benefit of the separate property on which it was raised. The status of Mrs. Fife's separate property, having been fixed as such at the time of its acquisition, would remain so fixed unless changed by deed, due process of law, or by the working of some form of estoppel. *Katterhagen v. Meister*, 75 Wash. 112, 134 Pac. 673; *In re Deschamps' Estate*, 77 Wash. 514, 137 Pac. 1009; *Morse v. Johnson*, 88 Wash. 57, 152 Pac. 677.

The money arising from the mortgage upon Mrs. Fife's separate property never having become community property, under the facts and the law, there was, of course, no commingling of community with separate property, as contended by appellant. Hence no question of the right of a community creditor to follow community funds commingled with separate property is presented.

The judgment of the lower court is affirmed.

MORRIS, C. J., CHADWICK, ELLIS, and MOUNT, JJ., concur.

[No. 12339. Department Two. October 20, 1916.]

**E. N. GRUBB *et al.*, Appellants, v. C. P. HOUSE, Respondent,
GEORGE W. HARDENBURGH, Defendant.¹**

LIMITATION OF ACTIONS—FRAUD—TIME OF DISCOVERY. An action for fraudulently representing that a well on premises leased to plaintiffs contained an abundant supply of pure water, is barred by the statute of limitations if not commenced within three years after taking possession when plaintiffs must have discovered the fraud.

EVIDENCE—PAROL—TO VARY WRITING—LEASE — CONTEMPORANEOUS WARRANTY. Where a written lease of hotel property is complete in itself, a prior or contemporaneous oral warranty as to the water in a well on the leased premises cannot be shown.

EVIDENCE—PAROL—TO VARY WRITING—DIFFERENT CONSIDERATION—FRAUDS, STATUTE OF. Where a lease of a hotel building for a five-year term was unacknowledged, it is inadmissible to show by parol, as an additional consideration for the full term, that the lessees, hotelmen of reputation, agreed to build up a patronage from which no revenue was expected at first; since no consideration was paid that went to the entire term, no recognition of the lease was made within one year prior to its expiration, and no permanent improvement was made by the lessee; and in such case it is inadmissible to show by parol a different consideration that modifies the legal effect of the lease.

FRAUDS, STATUTE OF — LEASE — PERMANENT IMPROVEMENTS — GOOD WILL. The good will of a lessee's hotel business does not operate as a permanent improvement by the lessee so as to remove the bar of the statute of frauds as to an unacknowledged lease for five years.

Appeal from a judgment of the superior court for Okanogan county, Pendergast, J., entered May 7, 1915, upon sustaining demurrers to the complaint, dismissing an action for wrongful eviction, tried to the court. Affirmed.

C. H. Neal and Smith & Gresham, for appellants.

J. W. Faulkner (Chas. A. Johnson, of counsel), for respondent.

MAIN, J.—This action was brought by the plaintiffs, as lessees of a certain hotel, for the purpose of recovering dam-

¹Reported in 160 Pac. 421.

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ages alleged to be due to a wrongful eviction. In the third amended complaint, it is sought to state separately two causes of action. To the first, a demurrer was interposed and sustained. To the second, a motion to strike certain paragraphs of the complaint was made, and this motion was sustained by the trial court. The motion seems to have been treated by the trial court as a demurrer, and the parties now treat it the same. While in form a motion, it will be here treated as a demurrer. After the demurrer had been sustained and the motion to strike granted, the plaintiffs refused to plead further and elected to stand upon the complaint. Judgment was entered dismissing the action. From this judgment, the appeal is prosecuted.

On the 31st day of October, 1908, a certain hotel building, located in the town of Oroville, Washington, was leased to the appellants for a term of five years beginning on the first day of January, 1909, and terminating on the first day of January, 1914. This lease is complete and formal in every respect, except that it was not acknowledged. Appellants went into the possession of the hotel under the terms of the lease, and occupied the same until the 31st day of December, 1912, at which time they vacated the premises in response to a notice to quit served upon them by the owners.

The lease, being unacknowledged, it is recognized by the appellants as invalid for the five-year term, unless the facts alleged are sufficient to remove the bar of the statute of frauds.

The first cause of action is based upon an oral representation alleged to have been made at the time the lease was entered into. This representation is to the effect that the well upon the premises which supplied water to the hotel contained a perpetual and abundant supply of good pure water, fit and suitable for drinking and other purposes. These representations are alleged to be false and untrue, and known to be such by the owners, but unknown to the appellants. The appellants treat the allegations of this cause of action as a charge

of fraud. The respondent treats them as an attempt to allege a prior or contemporaneous oral warranty.

If, in this cause of action, there is an attempt to charge fraud, then no cause of action is stated because the action is not begun in time. Possession of the property was taken under the lease on the first day of January, 1909. The present action was not instituted for more than three years thereafter. At the time possession was taken or very soon thereafter, the appellants must have known, if such be the fact, that the well did not contain a supply of pure and wholesome water.

If the allegations are intended to show the breach of a prior or contemporaneous oral warranty as to the water in the well, no cause of action is stated. On this question the rule is that, where the instrument is complete in itself, evidence of a prior or contemporaneous warranty is inadmissible. *Eilers Music House v. Oriental Co.*, 69 Wash. 618, 125 Pac. 1023; *Pacific Aviation Co. v. Philbrick*, 67 Wash. 414, 121 Pac. 864.

By the allegations in the second cause of action, there is apparently an attempt to remove the case from the operation of the statute of frauds, either by showing a consideration that goes to the entire term, or a permanent improvement during the time of the occupancy of the hotel.

It is alleged that, at the time the lease was executed, the appellants were efficient and popular hotel keepers and, as such, enjoyed a splendid reputation throughout the state; that the hotel, at the time and prior thereto, was vacant and producing no revenue; that, in order to build up the name of the hotel and make it popular and revenue producing, the owners sought the appellants as tenants; that it was known to both parties to the contract, at the time the lease was executed, that it would take months if not years to obtain sufficient patronage to pay running expenses; that profits could not be expected until the latter part of the five-year lease; and that all the parties understood that the sole in-

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ducement to the appellants for entering into the lease was that it should continue for five years. It is further alleged that, after the appellants took charge of the hotel, it was operated at a loss for a time; that, at the time the house was vacated, it was being operated at a profit, and had been given a lasting and valuable reputation as a first-class house.

In support of this cause of action, the case of *Matzger v. Arcade Building & Realty Co.*, 80 Wash. 401, 141 Pac. 900, L. R. A. 1915A 288, is cited; but that case is distinguishable. There "A," the tenant, at the time of making the lease, paid a consideration which went to the entire term in addition to the rental to be paid at stated periods throughout the term; "B" put in a new front in the storeroom upon the faith of the lease; and "C," the manager of defendant company, recognized the lease as valid within one year prior to its expiration. In this case, no consideration was paid for the lease which went to the entire term, no recognition of the lease as valid was made within one year prior to its expiration, and no permanent improvement was made by the lessee.

If the oral understanding of the parties, as alleged, can be shown under the guise of proving a different consideration than that mentioned in the written instrument, it would modify or change the legal operation and effect of the lease which is complete in itself. While it is a familiar rule that a consideration additional to that mentioned in a written contract may be proved by parol evidence, it is also well settled that this may not be done where the proof of such additional consideration by parol evidence would change or alter the legal operation and effect of the written contract, or add new matter to a stipulation of the contract complete on its face. *Smith Sand & Gravel Co. v. Corbin*, 81 Wash. 494, 142 Pac. 1163; *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183; *Erfurth v. Erfurth*, 90 Wash. 521, 156 Pac. 523.

No authority has been presented which would sustain the proposition that the good will of a business may operate as

a permanent improvement to the freehold so as to remove the bar of the statute of frauds. The very nature of the good will is such that it could not well be considered permanent.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, and PARKER, JJ., concur.

[No. 13380. Department Two. October 20, 1916.]

L. L. LEE *et al.*, *Appellants*, v. PASCO THEATRE COMPANY
et al., *Respondents*.¹

JUDGMENT—RES JUDICATA—PERSONS CONCLUDED—DISMISSAL ON DISCLAIMER—CHATTEL MORTGAGES—FORECLOSURE. A judgment foreclosing a real estate and chattel mortgage upon a theater building and upon the fixtures and personal property therein, "or hereafter placed in said building," after purchase money mortgagees, under a subsequent mortgage on chairs and fixtures that had been placed in the theater subsequent to the execution of the first mortgage, had been made parties, had disclaimed any interest in the property covered by the first mortgage, and had been dismissed from the action upon such disclaimer, is *res judicata* and a bar to a second action by them to foreclose such subsequent mortgage, the subsequent mortgagees having moved to modify the former judgment on the ground that the copy of the first mortgage served on them failed to contain the words "or hereafter placed in said building," and having failed to prosecute an appeal from the judgment or from the refusal to modify the same; since the same property was claimed by the parties to the former action and the title determined therein.

CHATTEL MORTGAGES—FORECLOSURE—DEFICIENCY JUDGMENT—PERSONS LIABLE. A deficiency judgment cannot be entered against individual defendants who had not signed a chattel mortgage, but had misrepresented the financial ability of the mortgagor, where the foreclosure failed because barred by a judgment in a former action involving the same property when the mortgagor disclaimed interest in the property.

Appeal from a judgment of the superior court for Franklin county, Mills, J., entered October 23, 1915, denying relief against certain defendants, in an action to foreclose a chattel mortgage, tried to the court. Affirmed.

¹Reported in 160 Pac. 435.

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Opinion Per MAIN, J.

Chas. W. Johnson, for appellants.

Gerard Ryzek, for respondents *Cord et al.*

Driscoll & Leonard, for respondent *John Ryzek*.

MAIN, J.—The purpose of this action was to foreclose a chattel mortgage as against the defendant Pasco Theatre Company, a corporation, and for a deficiency judgment against the other defendants. The trial resulted in a judgment against the trustee in bankruptcy appointed by the Federal district court for the Pasco Theatre Company, for the amount demanded in the complaint. As against the other defendants, relief was denied. From this judgment, the plaintiffs prosecute the appeal.

The controlling facts are these: Sometime during the early part of the year 1914, the Pasco Theatre Company was organized for the purpose of taking over, completing and operating an incomplete theatre in Pasco, Washington, known as the Cord Theatre Company property. After assuming control of the property, the Pasco Theatre Company purchased from the appellants certain chairs, draperies, carpets and other articles of personal property for the purpose of furnishing and equipping the theatre. In payment for these articles, two notes were given, one for \$555.86, which represented the price of the chairs, and the other for \$504.75, which represented the purchase price of the other articles. For the purpose of securing the payment of the \$555.86 note, a chattel mortgage was given upon all the property which had been sold by the appellants to the theatre company. This included the chairs, draperies and carpets. The note and mortgage were executed by the corporation and not by the other defendants as individuals. Throughout the briefs, frequent reference is made to the note not secured by the mortgage, but as that note is not involved in this action, no further reference will here be made to it.

On January 25, 1915, the present action was instituted. Prior to the time this action was begun, an action in the

same court entitled *Barr v. Ryzek et al.*, was pending. In that action the plaintiff had furnished material and performed labor upon the theatre building and was seeking to foreclose a lien. There were a number of other lien claimants in the action, either as defendants or as interveners. John Ryzek and wife, who claimed to be the owners of the theatre property, were parties defendant, and J. A. Ryzek, a mortgagee, was also a party defendant. John Ryzek and wife appeared in the action by answer and cross-complaint. In their cross-complaint, they claimed title to the building and the lot upon which it was located, and also claimed the fixtures and equipment in the building, including the curtains, floor coverings and draperies. By this cross-complaint, the appellants here, Lee and Perry, were made parties and brought into the action. J. A. Ryzek appeared by answer and cross-complaint and sought the foreclosure of a mortgage held by him, which mortgage was drawn both as a real estate and a chattel mortgage. The chattel mortgage clause covered "all personal property, chairs, fixtures, furniture and equipment in the theatre building on said premises or hereafter placed in said building." This mortgage was executed on the 18th day of August, 1914. The chattel mortgage, foreclosure of which is sought in this action, was executed on the 14th day of October, 1914. The property covered by the chattel mortgage had been placed in the building prior to its execution, and subsequent to the execution of the J. A. Ryzek mortgage.

Lee and Perry, on March 29, 1915, filed an answer to the cross-complaints of John Ryzek and wife and J. A. Ryzek. The first paragraph of this answer recites, "That at no time did the said Lee and Perry have or claim any interest in or to the property involved in the above entitled cause, and do not now claim any interest or title in or to said property." The answer concluded with a demand that the answering defendants be dismissed from the action. Thereafter, J. A. Ryzek moved for judgment on the pleadings against Lee and

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Perry. The motion was based upon the disclaimer contained in the answer. On April 13, 1915, an order was entered by which the motion was granted, and it was adjudged that the lien of J. A. Ryzek "is prior and superior to any claims of L. L. Lee and F. L. Perry, and that the defendants L. L. Lee and F. L. Perry had no interest or title in or to any of that property mentioned in the cross-complaint of J. A. Ryzek."

Thereafter, the Barr action proceeded to trial and judgment without Lee and Perry, and on July 21, 1915, a judgment was entered therein. In this judgment John Ryzek and wife were given the real estate, consisting of the building and the lot upon which it was erected, "together with the appurtenances and equipment thereunto belonging, including the draperies and all fixtures permanently affixed and attached to the building located on said premises excepting, however, the Sea Grass chairs and carpets now located in said building." J. A. Ryzek was given a judgment for \$3,000 and interest against the Pasco Theatre Company and the trustee in bankruptcy of that company, and the judgment recites "is also hereby awarded a judgment of foreclosure of the chattel mortgage of said J. A. Ryzek upon the Sea Grass chairs, being of the approximate number of ninety, and upon the carpets." The judgment contained a direction that this property should be sold in the manner provided by law, and the proceeds thereof should be applied on the chattel mortgage and the notes secured thereby.

On September 23, 1915, Lee and Perry appeared in the Barr action by motion to modify the judgment so as to foreclose the J. A. Ryzek mortgage only against the real property and personal property owned by the Pasco Theatre Company at the time of the execution of that mortgage. This motion was based on the claim that the copy of the mortgage served upon Lee and Perry as a part of the cross-complaint of J. A. Ryzek did not contain the clause "or hereafter placed in said building." On the 9th day of November, 1915, an

order was entered denying the motion to modify the judgment. So far as this record shows, no appeal was ever prosecuted from the judgment in the Barr action, or from the order denying the modification.

The controlling question upon this appeal is whether Lee and Perry, in view of the record in the Barr case, can now maintain an action to foreclose their mortgage. To this question it would seem there could be but one answer. The property now sought to be foreclosed upon, including the chairs, floor coverings and draperies, were involved in the Barr action. By the judgment in that action the draperies and other fixtures attached to the building were awarded to John Ryzek and wife, the owners of the real estate. J. A. Ryzek was given a judgment of foreclosure upon the chairs and floor coverings. To that action the appellants had been made parties and disclaimed any interest in the property there involved, and were dismissed out of the action. From the judgment, no appeal was prosecuted. That judgment became final and conclusive upon the parties. Whether the rights of Lee and Perry under their mortgage are superior to those of John Ryzek and wife or to J. A. Ryzek, cannot now be inquired into. If the copy of the mortgage served upon the appellants was incorrect, or even if that mortgage was void as against the appellants, that question cannot now be reviewed. Lee and Perry were properly made parties in the Barr action. The same property which is involved in this action was claimed by parties to that action, and their claims were confirmed by the judgment of the court, from which no appeal was prosecuted.

As to the deficiency judgment, it need only be said that, since the foreclosure failed, the evidence would not authorize a deficiency judgment against the other defendants. Whether there could have been such judgment if there had been a foreclosure and sale and a deficiency resulted, need not here be determined. The deficiency judgment was sought because it

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Syllabus.

was claimed that the individual defendants had misrepresented the financial ability of the corporation.

The judgment is affirmed.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 12998. Department One. October 21, 1916.]

AL ALDREAD, *Respondent*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Appellant*.¹

COMMERCE — "INTERSTATE COMMERCE" — WHAT CONSTITUTES. The initial movement of a refrigerator car for icing incident to its loading and billing to a point outside the state is a service rendered in the movement of interstate commerce within the Federal employers' liability act.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—FEDERAL LIABILITY ACT—SAFETY APPLIANCE ACT. Where an accident in interstate commerce occurred through the master's negligence, the Federal employers' liability act defines the rights of the employee and the rights of the parties depend upon it and not upon the safety appliance act.

SAME—INJURY TO SERVANT—ACTIONS — ISSUES AND PROOF — NEGLIGENCE. Upon an issue as to whether cars were in a train movement without having the air coupled as required by the safety appliance act, the absence of markers required on the rear of trains does not tend to show that it was a train movement.

SAME. Upon an allegation of negligence in releasing the air brakes on a switch engine after it had come to a stop, whereupon the momentum of the cars shoved the engine onto the plaintiff, it is inadmissible to prove a rule requiring all trains to carry markers or green flags and that flags were not displayed, since that was an independent act of negligence which in no way contributed to the injury.

SAME. Upon an issue as to whether cars were in a train movement without having the air coupled as required in the safety appliance act, it is inadmissible to prove that the company issued a train bulletin for another division after the accident requiring cars moved between certain points in such other division to be coupled with air.

¹Reported in 160 Pac. 429.

SAME. Upon such issue it is inadmissible to prove a rule requiring "train pipes to be connected," the fact being admitted that the pipes were not connected.

SAME—ISSUES AND PROOF—OPINIONS—REBUTTAL. Upon an allegation of negligence in releasing the air brakes on a switch engine after it had come to a stop, whereupon the momentum of the cars shoved the engine onto the plaintiff, it is reversible error to allow the plaintiff in rebuttal to testify that something else might have intervened, as a leaky valve or the application of steam, to start up the engine after release of the air; since it was not within the issues, and was speculative and merely the opinion of a nonexpert; and furthermore not proper rebuttal.

Appeal from a judgment of the superior court for King county, Humphries, J., entered February 24, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a railway brakeman. Reversed.

C. H. Winders, for appellant.

Griffin & Griffin, for respondent.

CHADWICK, J.—Respondent was engaged as a brakeman in a switching crew. The crew was regularly assigned to do the switching in and between Puyallup and Sumner during the berry season. The distance between Puyallup yards and Sumner yard is about a mile. Over this intervening space, switching is done on the main track. At the time plaintiff was injured, the crew was moving two cars, a flat car loaded with wood consigned to Sumner, and a refrigerator car, with passenger equipment, which had been iced at the ice house at Puyallup and was being moved to the Fruit Growers' Association warehouse at Sumner for loading. The car was there loaded and thereafter consigned to Grand Forks, in North Dakota. The engine was backing and pulling the two cars. There was a step or footboard on the tender. Switch engines are usually so equipped for the convenience of the switchmen. The air was not coupled between the engine and the cars. The train was controlled by a direct application of the air upon the engine.

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The conductor, the swing brakeman, and respondent rode on the footboard from Meeker junction to Sumner. As the train slowed down and was about to stop at the station, the conductor and the swing brakeman stepped off the footboard. Respondent says that, just as the train was about to stop, he gave the signal to the fireman to stop; that the engine did stop; that he stepped off, and instantly the engineer released the air, and the momentum of the cars was such that they struck or pushed the engine, moving it forward about three feet; that the footboard caught him on the back of the foot or ankle and doubled his leg over his foot, crushing and bruising it so that he has suffered permanent injuries. Other facts will be mentioned in our discussion of the law. The appeal is prosecuted from a verdict and judgment in favor of the respondent.

The first question is whether the Federal employers' liability act applies in this case. We have recently examined that act and reviewed the cases. The icing of the car was an initial movement incident to its loading and billing to a point outside of the state and we hold, under the authority of *Bolch v. Chicago, Milwaukee & St. Paul R. Co.*, 90 Wash. 47, 155 Pac. 422, that it was engaged in interstate commerce at the time respondent was injured.

Whatever the movement may be called, under the testimony of respondent, the question whether due and reasonable care for the safety of its employees demanded of appellant a coupling of the air is for the jury.

The most material inquiry upon the trial was whether the movement of the cars from Puyallup yards over the intervening space into Sumner yards was a train movement or a switching movement, respondent contending that, inasmuch as there were two cars and an engine moving over the track between the two yards, it was a train movement and that the cars should have been coupled with the air. To sustain his theory, respondent sought to show that the train was moved without complying with the safety appliance act. It is pos-

sible that counsel were of opinion that it was necessary to show a violation of the safety appliance act in order to avail themselves of the right to recover, notwithstanding a finding of negligence on the part of the respondent. Respondent is entitled to that benefit under our holding that appellant was engaged in interstate commerce. The employers' liability act of April 22, 1908, 35 Statutes at Large, p. 65, defines the right of the employee in such cases, and the rights of the parties depend upon it, and not on the safety appliance act.

Counsel was permitted, over the strenuous objection of counsel for appellant, to prove a rule and custom requiring all trains to carry markers or green flags upon the rear of a train, and that such markers were not displayed upon the rear car at the time respondent was hurt. While the presence of the markers might tend to prove that appellant was engaged in a train movement, the absence of such markers could have no relevancy whatever. The presence or absence of the markers had nothing to do with the accident. They are used to give notice to other trains of the movement and character of a train running with or opposite to them, to avoid collisions and to indicate rights of way. The error of the court in admitting such testimony is apparent. Its presence in the record is not accounted for upon any reasonable or legal grounds. Counsel's argument is no more than this: If markers had been displayed, it would have been a train. They were not displayed, and it was a train anyway. It neither proves nor tends to prove any fact material to the issue. Its tendency was to convict appellant of an independent act of negligence—a disregard of its rules, which in no way contributed to the injury. Subject to the well settled doctrine that notice of a defect may be proved by other accidents occurring at a given place, it has been repeatedly held that evidence of an independent act of negligence is not material or relevant. *Dickey v. Northern Pac. R. Co.*, 19 Wash. 350, 53 Pac. 347; *Henne v. Steeb Shipping Co.*, 37 Wash. 331, 79 Pac. 938. More especially when the act com-

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plained of in no way contributed to the injury. 1 Greenleaf, Evidence (14th ed.), § 52.

The court permitted respondent to introduce a train bulletin, issued by the division superintendent after the accident to respondent, requiring all cars moved between Sedro Woolley and Clear Lake, Washington to be coupled with air. This seems to have been relied upon as an admission that the movement of cars along a main track constituted a train movement and not a switching movement, and to show inferentially an admission on the part of the company of a negligent practice. The admission of this testimony was error. The manner of moving trains upon another division could have no bearing on the question in this case. In *Bell v. Washington Cedar Shingle Co.*, 8 Wash. 27, 35 Pac. 405, the court cited and relied upon the case of *Columbia & Puget Sound R. Co. v. Hawthorne*, 144 U. S. 202, 207:

"The evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendants."

See, also, *Carter v. Seattle*, 21 Wash. 585, 59 Pac. 500.

Respondent was permitted, over the objection of plaintiff, to introduce a book of rules containing, among others, the following: "Train pipe must be connected to permit of operation throughout the train." This, too, was error. Granting that the inquiry, whether the movement was a train movement or switching movement, was material, the offer of the rule did not tend to prove or disprove the fact. It is admitted that the air was not coupled. The only inquiry then is, did the accident occur because the air was not coupled, not whether the rule required it to be so. To illustrate, appellant could not have offered the rule, the cars not being coupled with air, to prove that it was engaged in a switching movement, al-

though the construction put upon such rules by those who operate under them is often given great weight in determining a disputed fact. If it were admitted or were proved by independent evidence that the engine and cars made up a train within the meaning of the safety appliance act, and the order of the interstate commerce commission, the rule might then be admitted to make a *prima facie* case of negligence.

After respondent had developed his case upon the issues made by the complaint and answer, that is, that the engineer had negligently released the air at the very moment that the engine stopped, and appellant had produced a number of witnesses whose testimony tended to disprove this theory and to affirmatively show that the air had not been released at all, and further, that the air could not have been instantly released, but that the operation would require from eight to eleven seconds, respondent was put upon the stand in rebuttal. He was interrogated as follows:

"In answer to a question of Mr. Winders' you stated that it was the action of the cars in pressing and bumping against the engine that caused the tank or the footboard to back over you? . . . That that was what caused the tank to back over you—I want to ask you whether you know whether it was that or whether it was steam applied to the cylinder from the locomotive? Mr. Winders: I object to that on the ground that it is leading and suggestive. Mr. Griffin: The witness, if your honor please, should always have an opportunity to explain his answers. He has made an answer to a question which he did not thoroughly understand, and he should be given an opportunity to correct it. Mr. Winders: It is for the jury to say whether he understood it. Mr. Griffin: I call the witness' attention to that one answer and I desire the witness to have an opportunity to explain it. Mr. Winders: He said the reason he got hurt was because the engineer released the air on the engine. Mr. Griffin: We still insist that was the reason he was hurt. Mr. Winders: Then why are you trying to inject it here that it was because of something else? Q. Mr. Griffin: Was there any answer which you make to Mr. Winders' question which you wanted to correct? Mr. Winders: I object to that on the

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ground it is incompetent. Mr. Winders: I object to that question, if your honor please, and there is nothing before the court. Mr. Griffin: Just explain the answer, if you wish to. A. I answered Mr. Winders' question last Friday as I understood his question. There might have been steam—the throttle might have been leaking steam, or there might have been other causes, whereas, as he released his straight air that it might have forced the engine back. I answered Mr. Winders' question the way I understood him to ask me. I could not say but what this was a defective throttle at the time, but if the engineer had held on his brakes they would not have come back."

Mr. Winders moved to strike the answer, and Mr. Griffin said: "I am perfectly willing that that portion of the answer should be stricken." While the record is confused, it is likely that the court ordered it stricken.

Mr. Griffin asked the further question: Q. "Was there any further explanations which you wish to make, Mr. Aldread?" Witness was allowed to answer over objection:

"Well, I simply want the jury to understand that I answered Mr. Winders' question last Friday as I understood his question. I made the remark that, had the engineer held on to his straight air the instant he came to this stop that these causes would not have occurred. There might have been something else happened then—there might have been a leaky throttle, or there might have been other power which would cause that engine to come back and catch me, that is all—"

Mr. Winders again moved to strike. Mr. Griffin said: "I consent that the leaky throttle may be thrown out," but followed it by the question:

"What I wanted to ask was this, if your honor please, to find out whether or not when the brake was released the engine might have been pushed ahead by reason of the throttle not having been completely shut off—by steam applied in the cylinders. Q. Mr. Griffin: Don't refer to any leaky throttle or anything of the kind, but might the train have been propelled backward by the action of steam as well as by the bump? A. Yes. Mr. Winders: I object to that on the same ground, as not any issue in this case. Mr. Griffin: It is an

issue. We allege that the train was backed up wrongfully, carelessly and negligently. The Court: I will overrule the objection and allow you an exception."

The admission of this testimony is so obviously prejudicial that it needs no discussion. But counsel insists that it was within the issues as tendered in his complaint. We are not disposed to hold that any negligence other than the misuse of the air was charged in the complaint, but if so, it was an abuse of discretion on the part of the court to receive such testimony. It was speculative. The opinion of respondent had no foundation of fact to sustain it, nor was it shown that he was capable of expressing an opinion. Furthermore, the issue had been waived if tendered. The only testimony respondent was free to offer in rebuttal was such as tended to rebut the affirmative testimony of the appellant.

For all these reasons, a new trial must be had. The issues will be greatly simplified. The only issue is whether the air was released, and if so, whether the cars would not have pushed the engine—if they did push it—if the engine and cars had been coupled with the air.

Reversed and remanded.

MOUNT and ELLIS, JJ., concur.

MORRIS, C. J., concurs in the result.

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[No. 13078. Department One. October 21, 1916.]

MOORE & COMPANY, *Appellant*, v. NETTIE E. BURLING *et al.*,
Respondents.¹

BILLS AND NOTES—BONA FIDE HOLDERS—FRAUD—NOTICE—EVIDENCE—SUFFICIENCY. Although a large discount puts a purchaser on inquiry, that fact, with notice that mortgage notes were given in payment of mining stock, is not sufficient to show that the purchaser had notice of fraud in the procurement of the notes, where inquiry was made of the maker before purchase and the maker stated that the notes were all right, and it was shown that the investment was not well thought of.

SAME—BONA FIDE HOLDERS—DISCOUNT—AMOUNT OF RECOVERY. Under Rem. 1915 Code, § 3448, providing that the holder in due course holds the instrument free from any defects and may enforce payment for the full amount against all parties, a *bona fide* purchaser at a large discount may recover from the maker the full face of mortgage notes.

SAME—NEGOTIABILITY—PROVISIONS IN MORTGAGE AS TO SECURITY. Mortgage notes are not rendered nonnegotiable by provisions in the mortgage respecting insurance, payment of taxes and attorney's fees on foreclosure which would have rendered the notes nonnegotiable if incorporated in the notes, as the provisions relate merely to the preservation of the security.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 6, 1915, upon findings in favor of the defendants, in an action to foreclose a mortgage, tried to the court. Reversed.

Farrell, Kane & Stratton and *Stanley J. Padden*, for appellant.

F. C. Kapp, for respondents.

FULLERTON, J.—The Charleston National Mining Company is a corporation organized under the laws of the state of Washington. In 1913, it held a leasehold interest in certain undeveloped mining property situated in the state of Nevada, which it was developing through means obtained by

¹Reported in 160 Pac. 420.

sales of its capital stock. J. P. Clough was the president and manager of the company and had charge of such sales. In October of the year named, he came to Seattle and engaged the assistance of Kay McKay, a broker doing business in Seattle, to sell the stock, agreeing to allow him a fifty per cent commission on all stock sold by him or through his assistance. McKay introduced Clough to the respondent Nettie E. Burling, and they jointly endeavored to induce her to make an investment in the stock. After a time they succeeded, Mrs. Burling taking \$7,500 worth of the stock at its par value. In payment for the stock, Mrs. Burling gave her promissory notes for the amount of the purchase, securing the same by a mortgage upon real property which she owned in the city of Seattle. The notes were six in number, were negotiable in form, and were payable on or before two years after their respective dates, with interest at eight per cent per annum, payable semi-annually, and contained an accelerating clause making the whole debt due and payable in case of the failure to pay any installment of interest when due.

After procuring the mortgage, Clough, with the aid of McKay, sought to sell the same to investors in the city of Seattle, but could obtain for it no satisfactory price. Among the investors to whom it was offered, was the appellant, Moore & Company, who refused to take it at the price at which it was first offered. After further attempts to sell it to other parties, it was brought back to Moore & Company, who purchased it for \$5,000 in cash.

Mrs. Burling paid the first installment of interest when the same became due, but defaulted as to the second. Moore & Company thereupon began this action to foreclose the mortgage, electing to declare the whole sum due and payable. Mrs. Burling answered, setting up fraud in the procurement of the notes. Moore & Company replied, denying the fraud, and pleading affirmatively that it was a holder in due course. After a trial, the court held with Mrs. Burling, finding that the notes were procured from her through fraud practiced

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upon her by Clough and McKay, and that Moore & Company purchased the notes with knowledge of the fraud. Judgment was entered accordingly, from which Moore & Company appeal.

On the first branch of the case, we have no hesitancy in saying that the findings of the trial court are abundantly supported by the record. The evidence makes it clear that Mrs. Burling was grossly deceived by Clough and McKay and induced to purchase the stock because of such fraud and deceit.

With reference to Moore & Company, however, we have been unable to conclude that the evidence justifies the finding of the trial court. In the transactions leading up to the purchase of the notes, the company was represented by J. E. Moore, its manager. A careful reading of the record does not disclose that he in any manner participated in the sale of the stock to Mrs. Burling, or knew of the fraudulent acts or representations of Clough and McKay which induced Mrs. Burling to make the purchase. While it is inferable that he knew that the notes were given for the purchase of mining stock, and knew that Clough and McKay were selling stock in the particular mine, it is not in evidence that he knew anything concerning the value of the stock, or anything more about the mining company or its prospects than did Mrs. Burling herself. It is true he bought the mortgage for his company at a large discount; but this, while it might put the purchaser on inquiry, is not sufficient alone to constitute bad faith. *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903; *Citizens' Bank v. Stewart*, 22 Cal. App. 91, 133 Pac. 337; *Ham v. Merritt*, 150 Ky. 11, 149 S. W. 1131.

Here the purchaser did make inquiry. Before purchasing the notes, Moore communicated with Mrs. Burling by telephone, telling her that he purposed purchasing the notes, and inquired if the notes and mortgage were "all right," receiving an answer in the affirmative. The record abundantly shows, furthermore, that the paper was not considered a par-

ticularly desirable investment by other dealers in such paper. Prior to the time it was offered to Moore & Company, it had been in the hands of a number of brokers, who had been unable to sell it even at the price it was finally sold to that company.

Other considerations are urged which it is contended show that Moore & Company is not a purchaser in good faith. These we shall not notice specifically. To our minds they are insufficient to excite even a suspicion, much less do they establish bad faith with that degree of certainty necessary to be found in order to overcome the presumption of good faith and fair dealing.

It is urged that, if recovery be allowed, it cannot be for a larger sum than the amount paid by the purchaser for the notes with interest. The legislature, however, has willed otherwise. By the negotiable instruments act (Rem. 1915 Code, § 3448), it is provided that the holder in due course holds the instrument free from any defects, and "may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

A further contention is made to the effect that the notes are not negotiable. This is founded on the fact that the mortgage given to secure their payment contained provisions respecting insurance, payment of taxes, and attorney's fees on foreclosure which would have rendered the notes non-negotiable if incorporated therein. But the rule is that the provisions contained in a mortgage securing a contemporaneous note, which merely relate to the preservation of the security, are not made a part of the note so as to destroy its negotiability, under the rule that contemporaneous instruments relating to the same subject-matter must be construed together. *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159.

The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

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Opinion Per ELLIS, J.

[No. 13226. Department One. October 21, 1916.]

**M. H. EGGLESTON *et al.*, Appellants, v. ALEX PANTAGES
et al., Respondents.¹**

CORPORATIONS — STOCK — ISSUANCE — PAYMENT — FRAUD — EVIDENCE — SUFFICIENCY. Subsequent stockholders cannot claim fraud in that a promoter of a theater company did not pay for his stock and procured their subscriptions by misrepresenting the cost of the theater building at \$75,000, when in fact it cost but \$36,379, where the promoter's stock was paid for by the completion of the building and the good will and booking privileges of his theatrical circuit, which was an asset of great value and earned a dividend of 136 per cent on all the capital stock within three years; and all the stockholders had, for six years, full opportunity to learn how the stock was paid for and did not claim to have relied on the representation as to the cost of the building; since their stock was worth at least all they paid for it.

EVIDENCE — PAROL TO VARY WRITING. An unambiguous written contract to purchase stock in a corporation in consideration of the completion of a theater building upon certain plans and specifications, cannot be varied by parol evidence to the effect that the cost of the building was represented to be \$75,000, and in fact was only \$36,379.

CORPORATION — INSOLVENCY — RECEIVERSHIP AND SALE — FRAUD — LACHES. Stockholders of an insolvent corporation who had notice of receivership proceedings that culminated in a creditor's sale, but made no appearance, are estopped by laches to claim fraudulent concealment as to the conditions, where they allowed the purchasing stockholder to meet all the losses for about three years, and only alleged fraud in the receivership and sale after the business began to show a profit.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 12, 1915, dismissing an action for an accounting, tried to the court. Affirmed.

Merritt, Oswald, Lantry & Merritt, for appellants.

Cannon & Ferris and *Ryan & Desmond*, for respondents.

ELLIS, J.—This is an action for an accounting grounded upon alleged fraud.

¹Reported in 160 Pac. 425.

For several years prior to 1907, defendants Alex Pantages, Lois A. Pantages, his wife, and Elvira Mendenhall, his mother-in-law, were, and still are, the only stockholders in defendant corporation, Pantages Theater Company. That corporation has been, and still is, operating in various cities throughout the Pacific Northwest a circuit of theaters known as the Pantages theaters. It had, and has, well established connections, called in the record franchises and booking privileges, throughout the United States and Europe, to enable it to supply a continuous succession of attractions at its various houses. Spokane was not upon the Pantages circuit. Defendant E. Clark Walker, a resident of Spokane, had long been a friend of Alex Pantages and suggested the idea of including that city in the circuit. This was desirable in order to shorten the jumps of the different attractions from one house to another and thus reduce transportation charges. The plan was finally consummated by the organization of a separate corporation, the Pantages Amusement Company, with a capital stock of \$75,000, in seven hundred and fifty shares of a par value of \$100 each, to operate a theater in Spokane in connection with the Pantages circuit. The stock of this corporation was, on May 24, 1907, subscribed as follows: Alex Pantages, one share; M. H. Eggleston, one share; E. C. Walker, one share; Melvin G. Winstock, one share; Lois A. Pantages, one share, and Elvira Mendenhall, seven hundred and forty-five shares.

It seems to be admitted that these seven hundred and forty-five shares were in fact subscribed for Alex Pantages, who claims to have paid for this stock by furnishing the theater building and turning over to the Pantages Amusement Company the use of his name and good will and the franchises and booking rights of the Pantages Theater circuit. On the same day, a meeting of these stockholders was held, by-laws were adopted, and Alex Pantages, M. H. Eggleston, E. C. Walker, Lois A. Pantages and Melvin G. Winstock were

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elected and qualified as trustees. These trustees at once met and elected officers as follows: Alex Pantages, president, M. H. Eggleston, vice-president; Lois A. Pantages, secretary, and E. C. Walker, treasurer. These trustees and officers were reelected at the next and succeeding annual meetings of the stockholders and trustees and held these respective offices throughout the active life of the corporation. Through Walker, plaintiffs and several other residents of Spokane became interested in the corporation, and on June 15, 1907, agreed to purchase \$25,000 of its stock by a written contract of that date, which, so far as here material, was as follows:

"That whereas, the Pantages Amusement Company has been incorporated with a capital stock of \$75,000 under the laws of the state of Washington, for the purpose of conducting a general theatrical business.

"Whereas, the said Alex Pantages, and his appointees, have practically subscribed for the entire issue of stock, and

"Whereas, it is desired that.....of Spokane, Washington, shall purchase at par \$25,000 worth of stock in said corporation,

"Now, therefore, it is agreed, that said \$25,000 worth of stock shall be paid for as follows:

"Fifty per cent upon the signing of these presents; 25 per cent on August 1, 1907; and the further 25 per cent when the Spokane Theater shall be fully completed and ready for occupation and use, as and for a theater, at which time, to wit, upon the final payment for said stock, the certificates for the same shall be duly issued to the respective parties hereto, in the amounts to which they are entitled.

"In consideration of the above, the party of the first part, the said Alex Pantages, agrees to alter the said Holley, Mason, Marks building, located in the city of Spokane, on Howard street, between Riverside avenue and Main avenue, into a completely equipped up to date theater, ready and in all respects in a workmanlike manner, fitted, furnished, lighted, heated, in accordance with plans and specifications furnished and prepared by architects Cutter & Malmgren, and to complete the said theater and turn it over to the Pantages Amusement Company at as early a date as is possible.

"And the said Alex Pantages further agrees to pay all rents and charges individually until such time as he turns over to said corporation, the said theater as aforesaid.

"In witness whereof, the said parties hereunto have affixed their hands and seals the day and year first above written.

"Alex Pantages

Walter Keller

"I. Van Winkle

M. H. Eggleston

"Thomas T. Thomson

E. C. Walker

"F. J. Lorenz

Alex Nelson

"Robert Keller."

Pursuant to this contract, Eggleston purchased fifty shares, Thomson twenty-five shares, Rodenbach fifty shares, Walker fifty shares, and the other parties to the contract an aggregate of one hundred and twenty-five shares, making in all three hundred shares of a par value of \$80,000. All of this stock was taken and paid for at par in money, as provided in the contract. For his services in securing this contract and in superintending the remodeling and equipment of the building, Walker received from Pantages fifty additional shares.

The building had already been leased by Pantages Theater Company from its owners for a period of fifteen years from April 1, 1907, at a monthly rental of \$1,000, payable each month in advance. The lease provided that the building should be fitted for a theater at the expense of the theater company, in accordance with specifications prepared by certain architects; that the alterations and fixtures should become a part of the freehold and, on termination of the lease, should pass to the owners of the premises; that the theater company should pay all taxes and assessments against the premises for the full term, and furnish insurance against fire and accident in an aggregate of \$72,000; and that a failure in any of these particulars, at the option of the owners of the premises, should work a forfeiture of the lease.

The building was remodeled and equipped, and on January 22, 1908, the premises were turned over by the Pantages Theater Company to the Pantages Amusement Company un-

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der a sublease for a period of fourteen years at the same rental of \$1,000 a month, and containing substantially the same provisions as the original lease. From that time for about three years, the theater was operated in connection with the Pantages circuit at great profit, paying dividends amounting to one hundred and thirty-six per cent of the entire capital stock of the Pantages Amusement Company. Business then fell off and a loss developed. The stock was nonassessable, but the stockholders all voluntarily paid back five per cent of the face of their stock to meet expenses. The loss continued and Pantages, Eggleston, Rodenbach, and possibly one other stockholder, paid another five per cent on their stock, the other stockholders refusing to pay anything further. The loss continuing, all save Pantages refused to make any further payments, and he alone continued to advance money to meet expenses.

In December, 1911, Eggleston brought an action for the appointment of a receiver, alleging that the corporation was deeply in debt and insolvent and was being mismanaged by Pantages in the interest of the Pantages Theater Company. This action was dismissed in consideration of Pantages agreeing in writing to pay Eggleston \$2,189. Eggleston thereupon reported by letter to the other stockholders to the effect that the business was being honestly managed and advising them to "stay with the ship" in the hope of better times or a sale of their stock.

On March 21, 1912, Lois A. Pantages brought an action in the superior court of King county (that being the legal domicile of the corporation) against the Pantages Amusement Company on a number of its notes, some made to her personally, others to Pantages Theater Company and assigned to her, aggregating about \$9,000, and asking for the appointment of a receiver to wind up the affairs of the company. Walker, as manager, accepted service and signed and filed an answer on behalf of the Pantages Amusement

Company, confessing the debt and consenting to the appointment of a receiver. The court entered judgment for \$9,712.51 and interest, and \$250 attorney's fee, and appointed William Wray, an attorney of Seattle, as receiver. The receiver, after visiting Spokane and making certain investigations, reported that the business was being operated at a heavy loss; that the monthly rental of \$1,000 was due and that the company had no means by which to pay it; that the lease was subject to forfeiture, which would carry with it all the fixtures and equipment; that the lease could not be sold at a profit and in fact was a liability rather than an asset, in that the premises could not then be rented for more than \$750 a month; that there was only \$400 cash on hand; that the company was indebted to Pantages Theater Company in the sum of \$10,000, and to the Exchange National Bank of Spokane \$5,000, as evidenced by demand promissory notes. The receiver recommended that an offer of Pantages Theater Company to take over the premises, including the fixtures and equipment, and relieve the amusement company from its liability on the lease be accepted. The report was approved and the transfer ordered. The transfer was accordingly made, the receiver made his final report thereof, which was by the court approved, and the receiver was discharged on April 23, 1912.

Thereafter the Pantages Theater Company continued to operate the theater as a part of its circuit, for a time at a continued loss, aggregating by August, 1913, approximately \$13,000. Since that time the Spokane house has apparently shown a profit.

On March 18, 1914, plaintiffs brought this action. The charges of fraud are, in substance: (1) failure of Pantages to pay for his stock in the Pantages Amusement Company; (2) that Pantages and the other defendants conspired to procure the receiver, falsely representing that the corporation was insolvent; (3) that defendants suppressed the true facts and thereby caused the receiver to turn over to Pan-

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tages Theater Company without adequate consideration the assets of the amusement company. It is alleged that Pantages is indebted to the corporation in the sum of \$29,500 for stock not paid for by him, and in the sum of \$37,170 received by him as dividends on this unpaid stock.

Defendants answered, denying all of the charges of fraud, and setting up as affirmative defenses: (1) the statute of limitations; (2) insolvency of the corporation when the receiver was appointed, full knowledge of plaintiffs of all the proceedings and of the appointment and doings of the receiver without objection by any of them; (3) the facts hereinbefore set out touching the organization of the amusement company, full knowledge of plaintiffs as to how the stock was subscribed and paid for, the contract with plaintiffs and others for the purchase of stock, defendants' performance of that contract, and pleaded laches on plaintiffs' part as an estoppel to the maintenance of this action. The reply traversed the affirmative matter in the answer. The cause was tried to the court without a jury. Judgment was entered dismissing the action with costs. Plaintiffs appeal.

The first and main charge of appellants is fraud on respondents' part in launching this corporation, in that Pantages paid no money for his stock. This is an action by stockholders who have been such since about two months after the stock was fully subscribed. No rights of creditors are involved. These appellants, at all times during the active life of the corporation, have had the right of full and complete access to the books of the corporation. One of them, at all times, has been vice president and trustee. There is no evidence that respondents, either by force, artifice or otherwise, have ever prevented appellants from acquiring the fullest knowledge as to how this stock was paid for. That the use of Pantages' name and good will and his franchises and booking privileges with the right to operate as a member of the Pantages circuit were assets of great value to the new theater cannot be seriously questioned. It is fairly apparent from

the evidence that, without these elements, the new venture as an independent theater would have had little chance of success. There is no evidence that they were not then in fact worth the sum for which Pantages claimed to have turned them over to this corporation. The very fact that, with no other assets save the lease of the theater premises and the building, the corporation for the first three years paid dividends amounting to one hundred thirty-six per cent on the entire capital stock at its par value is strong evidence of the value of these rights as an earning asset.

Appellants offered to prove that, in the negotiations leading up to the contract under which they purchased their stock, Pantages represented that it would cost \$75,000 to remodel the building, that he would furnish the remainder of that sum above what they paid for their stock, and that there was no understanding that he was to have any stock for the use of his name or for anything else but cash. But the trial court was of the opinion, and so are we, that, in the face of their unambiguous written contract purchasing this stock, this evidence was inadmissible. That contract recites, as the only consideration for their purchase and payment for the stock in money, that Pantages would turn over to the company the theater building fully equipped according to certain specifications, and pay the rent until it was so turned over. It is not questioned that he has performed that agreement. It is elementary that all prior negotiations were merged in this writing. The fact that it cost him only \$36,379 to meet this contract is immaterial. There was no offer of proof that appellants were induced to sign the contract and purchase the stock by the belief that the building would cost \$75,000. Had the remodeling of the building actually cost \$75,000, or even a greater sum and had Pantages failed to pay it, or had he paid for it from the earnings of the theater, a different question would be presented. There was no evidence, nor offer of evidence, that Pantages represented that he had paid cash for his stock. The doctrine that the capital stock of a

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corporation is a trust fund for the creditors and that all stock must be paid for in money or money's worth (*Lantz v. Moeller*, 76 Wash. 429, 136 Pac. 687, 50 L. R. A., N. S., 68), in the absence of fraud or misrepresentation, has no application as between the stockholders themselves where the rights of creditors are not involved. *Inland Nursery and Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499.

Even if it appeared that Pantages' name, good will, franchises and booking rights were not of the value at which he claims to have turned them over to this corporation in payment for his stock, the fact still remains that, during the whole business life of this corporation, these appellants, as stockholders, had every means of knowledge of what the building cost and what money or other assets the company possessed. Moreover, they were subsequent stockholders. They obtained full value in the purchase of their stock. The dividends which they received during the first three years furnish ample evidence of that fact. In such a case, where the rights of creditors are not involved, it is immaterial in what or how prior stockholders paid for their stock. *Inland Nursery and Floral Co. v. Rice, supra*. We are clear that appellants, at this late day, cannot be heard to say that they did not know that all of the stock was not paid for in cash, and cannot, in any event, claim injury through the purchase of stock which was then worth at least what they paid for it.

So far as this action rests upon the charges of fraud and conspiracy in the receivership proceedings and inadequacy of the consideration for the receiver's transfer of the assets to Pantages Theater Company, it seems plain that the defense of laches must be sustained. While the fact is disputed by one of the appellants, the evidence is convincing that all of the stockholders of Pantages Amusement Company were notified of the receivership proceedings, either at about the time of the application or soon after the transfer. Eggleston admitted that he had notice and soon afterwards investigated the proceedings and took the matter up with other stock-

holders. That the corporation was insolvent cannot be doubted. It had been running behind for months and Pantages alone had been meeting the losses. As early as December, 1911, Eggleston had commenced proceedings alleging insolvency. Appellants, when the thing was done, had every means of knowledge as to the manner in which the receiver was appointed and as to the consideration for the transfer that they now possess. Apparently, so long as the operation of the theater continued at a loss, they were content to recognize the receiver's transfer as a valid transaction. Soon after it began to show a profit, this action was begun. If, as charged, the receivership was conceived in fraud and conspiracy and the transfer was approved by the court through suppression of the facts, these things were as easily discoverable then as now. Even as a direct attack to set aside the transfer this action would be too late. *Wright v. Tacoma Gas & Elec. Light Co.*, 53 Wash. 262, 101 Pac. 865; *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088. Viewed as an action for fraud, it is elementary that such an action must be brought as soon as the party alleging fraud is charged with knowledge of it.

A most careful consideration of the entire record has convinced us that the trial court reached the correct result.

The judgment is affirmed.

MORRIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

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[No. 13445. Department One. October 21, 1916.]

W. H. DELOB *et al.*, Respondents, v. THOMAS W. SYMONS
et al., Appellants.¹

MUNICIPAL CORPORATIONS—SIDEWALKS—TRAPDOORS—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Negligence in the maintenance of a trapdoor in a sidewalk is a question for the jury where there was evidence to the effect that the doors sagged down under the weight of a person, so that plaintiff's toe was caught under the edge of the door and she was tripped and fell and broke her leg.

NEW TRIAL—MISCONDUCT OF COUNSEL—PREJUDICE. A new trial for misconduct of counsel in argument in making statements outside the record was properly refused, where the jury were instructed to disregard them, they were not of such a character as to prejudice the jury, and the size of the verdict did not indicate passion or prejudice.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered November 3, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a pedestrian in falling upon a trapdoor. Affirmed.

M. T. Hartson, Thomas W. Symons, Jr., and Danson, Williams & Danson (George D. Lantz, of counsel), for appellants.

Guy B. Groff and O. E. Pardee, for respondents.

MOUNT, J.—This action was brought to recover damages for personal injuries sustained by Mrs. DeLor as a result of falling upon a trapdoor in the sidewalk in front of defendants' premises. Defendants denied that Mrs. DeLor received her injuries from the trapdoor or that the door was unsafe. These questions were submitted to a jury, which returned a verdict of \$1,300 in favor of the plaintiffs. At the close of the plaintiffs' evidence, and again at the close of all the evidence, the defendants moved the court for a nonsuit, for directed verdict, and for a judgment notwithstanding the ver-

¹Reported in 160 Pac. 424.

dict. These motions were denied, and a judgment was entered upon the verdict. Defendants have appealed.

Appellants seek a reversal upon two grounds: first, that the evidence is insufficient to show negligence; second, misconduct of counsel for respondents in argument to the jury.

It is contended by the appellants that the evidence shows that the trapdoor was constructed of two iron doors in an iron frame, that these doors were the kind commonly used, and that they were in perfect repair. The evidence on behalf of respondents was to the effect that the trapdoors were not solid, by reason of the fact that, when a person stepped upon one of the doors, it gave down from one-half to three quarters of an inch so as to permit a person's toe to catch under it; that Mrs. DeLor, while walking upon the sidewalk, stepped upon this trapdoor, her weight caused it to sag down so that her toe caught under the projection of the joint between the two doors and caused her to fall and break her leg. There was other evidence to the same effect. We think it is plain that the evidence made a question for the jury whether the trapdoors were maintained as an ordinary careful person would maintain such structures in a busy section of a city. If the appellants maintained the trapdoor so that, when stepped upon, it would give down so as to permit a person's toe to catch therein, they would be negligent and liable in damages to a person using the street in the ordinary manner and stepping upon the trapdoor without notice of the defect. *Seattle v. Puget Sound Improvement Co.*, 47 Wash. 22, 91 Pac. 255, 125 Am. St. 884, 12 L. R. A. (N. S.) 949; *Smith v. Tacoma*, 51 Wash. 101, 98 Pac. 91, 21 L. R. A. (N. S.) 1018. We are satisfied that the trial court did not err in submitting the question of negligence to the jury.

It is contended by appellants that counsel for the respondents in arguing the case to the jury went outside of the record, made statements which were not supported by the evidence, and that, on account of such misconduct, a new trial should have been granted. The record before us shows that counsel

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for the respondents did make statements to the jury which were outside the record and no part thereof. These statements were not legitimate arguments from the facts, but the trial court in instructing the jury told them in substance to disregard statements of counsel which were not supported by the evidence, and was of the opinion, upon motion for new trial, that these statements were not of such character as to prejudice the jury against the appellants, and that the size of the verdict did not indicate any passion or prejudice on the part of the jury. The trial court, for these reasons, was of the opinion that a new trial should not be granted. We are inclined to agree with the trial court that these statements were not so prejudicial as to warrant a reversal of the case. The judgment is therefore affirmed.

MORRIS, C. J., FULLERTON, CHADWICK, and ELLIS, JJ.,
concur.

[No. 12964. *En Banc*. October 24, 1916.]

ERNEST NAPOLEON ROBERTS, *Respondent*, v. PACIFIC
TELEPHONE & TELEGRAPH COMPANY, *Appellant*.¹

APPEAL—NOTICE—PARTIES TO BE SERVED—SURETIES ON PLAINTIFF'S COST BOND—DISMISSAL. Where plaintiff, on defendant's demand, gave a bond for costs, and secured a verdict, and defendant appealed, the failure of the defendant to serve notice of appeal upon the sureties on the cost bond will not work a dismissal of the appeal, where defendant waives all rights against the sureties on the cost bond.

Motion to dismiss an appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 20, 1915. Denied.

Post, Russell, Carey & Higgins, for appellant.

Robertson & Müller, for respondent.

ELLIS, J.—Plaintiff in this, an action for personal injuries, was required, on defendant's demand, to furnish a bond for

¹Reported in 160 Pac. 753.

costs, pursuant to Rem. 1915 Code, § 495. He secured a verdict. Judgment was entered thereon. Defendant appealed. The notice of appeal was served upon plaintiff, but not upon the surety in his costs bond. For this reason, plaintiff has moved that the appeal be dismissed, citing our recent decision in *Shippen v. Shippen*, 91 Wash. 610, 158 Pac. 247. In that case we held that, since by the act of 1909, Rem. 1915 Code, § 496, the legislature provided that, when a judgment shall be rendered against the principal for costs secured by a costs bond, a judgment for such costs shall be entered against the surety as of course, and since that act was passed in the light of the fact that this court had held from the beginning of our statehood that a similar provision as to the entry of judgment against the surety upon a forthcoming bond (Rem. 1915 Code, § 577), made such surety a party so interested in the result of the action as to entitle him to notice of an appeal, for the same reason the surety upon a costs bond is, under the act of 1909, a party so interested as to be entitled to notice of an appeal. The rule, though illogical and needlessly severe, has been steadily followed by this court since its first announcement in principle in *Cline v. Mitchell*, 1 Wash. 24, 23 Pac. 1013, and in terms in *Carstens v. Gustin*, 18 Wash. 90, 50 Pac. 933. A majority of this court being disinclined to overrule *Long Bell Lumber Co. v. Gaston*, 78 Wash. 598, 139 Pac. 641, and the many prior decisions which it follows, our decision in *Shippen v. Shippen*, *supra*, was inevitable. But, since the only possible interest the surety, as such, can have in the result of the action is referable to his liability upon the bond, it is manifest that, when that liability has been removed, his interest vanishes and he is no longer entitled to notice.

Acting upon this theory, the defendant, appellant here, has filed in this court a waiver in the broadest terms of any right that it might have upon any contingency to any judgment for costs against the sureties upon the costs bond filed in the superior court, and stipulating and agreeing that such

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costs bond may be held for naught and forthwith cancelled. The costs bond was given solely for defendant's benefit and at its instance. There is no reason, either in law or in morals, why it should not be permitted to waive all rights under the bond by an express and explicit disclaimer. Having done so, it can no more claim any right under the bond, or against the bondsman as such, than if the bond had never been given. The bondsman, therefore, no longer has any interest in the result of the action or in the appeal. The reason of the rule in the *Shippen* case being no longer present, that rule should no longer apply. We therefore hold that, when, in such a case, the party at whose instance a costs bond was furnished shall file at any time before the final decision in this court an express waiver of all rights under the bond, there shall be no necessity for service of notice of appeal upon the bondsman in order to perfect the appeal.

The motion to dismiss is denied.

MORRIS, C. J., PARKER, MOUNT, HOLCOMB, MAIN, and CHADWICK, JJ., concur.

FULLEERTON, J., concurs in the result.

[No. 13484. *En Banc*. October 24, 1916.]

W. J. LANGLEY *et al.*, *Appellants*, v. A. J. DEVLIN *et al.*,
Respondents.¹

APPEAL—NOTICE—PARTIES TO BE SERVED—SURETIES ON PLAINTIFF'S COST BOND. In an action brought by a nonresident plaintiff furnishing a bond for costs, in which judgment went for defendant but was not entered against the sureties on the cost bond, the sureties are not parties "similarly affected by the judgment or order appealed from" within Rem. 1915 Code, § 1720, and hence need not be served with notice of plaintiff's appeal.

Motion to dismiss an appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 9, 1916. Denied.

Cannon & Ferris, for appellants.

Robertson & Miller, John P. Gray, and Post, Russell, Carey & Higgins, for respondents.

ELLIS, J.—This action was brought by nonresident plaintiffs seeking, among other things, to enjoin the sale of certain stocks. They were compelled to furnish a bond for costs, upon demand of the defendants, as required by Rem. 1915 Code, § 495. The trial court entered a decree vacating the injunction. No judgment was entered against the surety upon the costs bond. Plaintiffs appealed. The notice of appeal was served upon the defendants, but not upon the surety in the plaintiffs' costs bond. Defendants, respondents here, seeking to invoke the rule announced in *Shippen v. Shippen*, 91 Wash. 610, 158 Pac. 247, have moved that the appeal be dismissed. That decision, however, is not controlling upon the record here. It is obvious that the interest of the appellants and that of the surety on their costs bond, so far as the latter ever had any interest as a contractual party to the action, are precisely the same. The requirement of service of notice

¹Reported in 160 Pac. 646.

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of appeal on any party having interest identical with appellant is only to enable all parties "similarly affected by the judgment or order appealed from" and who might have joined in the original notice of appeal, to join in the appeal by an independent notice within ten days after service on them of the original notice, thus avoiding successive appeals in the same action. Rem. 1915 Code, § 1720; *Peck v. Peck*, 76 Wash. 548, 137 Pac. 137. But the plaintiffs, appellants here, and the surety are not similarly affected by the judgment or order appealed from. No judgment was entered against the surety. It is in no manner affected by the judgment as rendered and, in the nature of the case, cannot be injuriously affected either by an affirmance or reversal of that judgment in this court. If the judgment be affirmed on the merits, respondents can only secure a judgment against the surety on the nonresidents' bond for costs by an independent action on that bond, if, indeed, all right to such a judgment has not been lost by the failure to take judgment on the bond at the time prescribed by the statute, namely, "at the same time" when the judgment was entered against the party "primarily liable." Rem. 1915 Code, § 496. As to whether that right is lost, we express no opinion. The question is not before us, and would not be before us even had appellants served their notice of appeal upon the surety.

If, on the other hand, the judgment be reversed, the surety will be conclusively relieved of all liability upon the costs bond. Herein lies the plain distinction between this case and the case of *Shippen v. Shippen*, *supra*. There the party in whose favor the costs bond ran, having suffered defeat in the trial court, could only entitle herself to a judgment for costs in the trial court, either as against the plaintiff or the surety on plaintiffs' costs bond, by a reversal of the judgment. The surety was, therefore, directly interested in having the judgment sustained on the appeal. On the record here, the surety has no such interest in the appeal, and not being a party to the judgment, even conceding that it was a party to the ac-

tion, it had no right to join in the appeal; hence it was not entitled to notice of the appeal. *Sipes v. Puget Sound Electric R. Co.*, 50 Wash. 585, 97 Pac. 723. See, especially, concurring opinion of Judge Rudkin, p. 595, and other cases there cited. See, also, *Wilson v. Puget Sound Elec. R. Co.*, 50 Wash. 596, 97 Pac. 727, and *Iverson v. Bradrick*, 54 Wash. 633, 104 Pac. 130.

A service of notice of appeal upon the surety here would have been an idle formality. It could not have joined in the appeal because it was not a party to the judgment; hence the evil of successive appeals, which the statute, Rem. 1915 Code, § 1720, was enacted to avoid, was not imminent. Respondents would have gained no right by such a service, and have lost no right by its absence.

Some suggestion was made in argument that certain other parties in interest were not served with notice of the appeal. The motion before us, however, is addressed solely to the failure to serve the surety upon the costs bond.

The motion is denied.

MORRIS, C. J., MOUNT, HOLCOMB, MAIN, PARKER, CHADWICK, and FULLERTON, JJ., concur.

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[No. 13440. Department Two. October 28, 1916.]

**JAMES E. FAUCETT, *Respondent*, v. NORTHERN CLAY
COMPANY, *Appellant*.¹**

CANCELLATION OF INSTRUMENTS — CONTRACTS — FRAUD IN PROCUREMENT—EVIDENCE—SUFFICIENCY—REPUDIATION—LACHES. A decree cancelling a contract for fraud in its procurement cannot be sustained upon findings that the plaintiff was a man of advanced years, poor eyesight, very hard of hearing, dull of comprehension and worn out with importunities, where the contract was fair in every respect, there was no evidence that plaintiff had any infirmity affecting his ability to contract, and, although a man of considerable experience, he took no steps to repudiate it while valuable improvements were being made in reliance upon it, and his testimony was overcome by that of his adversaries; since fraud in the procurement of a contract between competent persons must be proved by strong and convincing evidence, and repudiation must be made promptly under circumstances consistent with good faith.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered December 31, 1915, upon findings in favor of the plaintiff, after a trial before the court and an advisory jury. Reversed.

Milo A. Root, I. B. Knickerbocker, and Paul B. Phillips,
for appellant.

M. E. Brewer and Jno. Mills Day, for respondent.

CHADWICK, J.—This case was considered by this court, and opinion rendered that the contract relied on by appellant and sought to be cancelled and set aside upon the ground of fraud in its procurement was not void for uncertainty. The case was remanded for judgment unless respondent, upon the issues joined, sustained his charge of fraud. *Faucett v. Northern Clay Co.*, 84 Wash. 382, 146 Pac. 857. The contract is fully set out in our former opinion. The case came on for trial. A jury was called to advise the court by its verdict. A verdict in favor of respondent and for \$250 damages was returned. The court adopted the verdict in so

¹Reported in 160 Pac. 643.

far as it declared the ultimate fact, and made findings and conclusions. A decree was entered cancelling the contract.

The case is here for trial *de novo*. Appellant contends that respondent has failed to sustain the burden of proof, or to show by even a bare preponderance of the testimony that it was guilty of any fraud in the procurement of the contract. The facts, in so far as we shall discuss them, should be considered in the light of the holding of the court when overruling a motion for judgment *non obstante*. The court said:

"The court being fully advised in the premises, and the court having announced its finding that the plaintiff did not prove all of his allegations of fraud in the amended complaint, and that there was in fact no wilful or conscious fraud perpetrated upon the plaintiff on January 24, 1910, either by Paul S. MacMichael, the defendant corporation's president, or Paul B. Phillips, its attorney, in obtaining the contract between the plaintiff and the defendant of that date; and that the contracts in evidence as "Plaintiff's Exhibit A" and "Defendant's Exhibit 4" are the contracts actually signed by the plaintiff on January 24, 1910, and that there was no forgery or alteration of said contracts embodied in said exhibits by the defendant or any one on its behalf; and the court finding that the contract of January 24, 1910, was fully read to the plaintiff prior to the execution of the same; and the court finding that the plaintiff is a man of low mentality and that on January 24, 1910, he gave his consent to the terms of said contract because he was worn out by the importunities of defendant and did not meet the defendant's representatives on equal terms, and was thus overreached by defendant, and would not have signed the contract embodied in said exhibits if he had consulted an attorney at the time he signed said instruments, and the court deeming that such was the interpretation of the evidence also adopted by the jury, and the court deeming that said motion for judgment for the defendant should be denied; Now Therefore," etc.

And in the light of the formal findings of fact:

"That on said January 24th, 1910, said MacMichael and said Phillips, representing the defendant corporation, called

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upon plaintiff and represented to the plaintiff that said defendant corporation needed about four (4) acres of the ground covered by said lease to said Itabashi, for use in connection with its said plant, and requested plaintiff to consent to allow said Itabashi to sublease such amount of land near the factory of defendant to defendant; that plaintiff thereupon agreed to permit said Itabashi to sublease about four acres of land to the defendant corporation, and the said MacMichael and said Phillips prepared an instrument in writing; that said instrument was prepared in duplicate in long hand by the said Phillips, and was then and there signed by the plaintiff in person and by the said Paul S. MacMichael on behalf of the said defendant; that before said papers were so signed, the said Paul B. Phillips undertook to read the said papers and explain the same to the plaintiff; that the papers were signed at about the hour of 9 o'clock in the evening of said day; that the said Paul B. Phillips and the said MacMichael had spent the whole of said day from about the hour of 9 a. m. until the signing of said papers with the plaintiff and with his mother, who was a woman of advanced years, at their home, and that the said Paul B. Phillips and the said Paul S. MacMichael had gained the confidence of the said plaintiff and his said mother during said time; that the plaintiff did not read the same; that he was at said time, and is, as appears from the evidence and from his appearance and conduct upon the witness stand, a man of advanced years, poor eyesight, very hard of hearing, dull of comprehension, and with meager training, and that he was worn out by the importunities of said Phillips and the said MacMichael, and that the said papers as read to him by the said Phillips were not understood in their full purport, purpose and meaning by him; that the plaintiff did not understand that he was required to sell said real estate to the defendant at any time; that he did not understand that he was required by said papers to submit any question to arbitration; that he did not understand that he could be compelled to lease the said real estate to the defendant for a term subsequent to the lease of the Japanese, Itabashi; that the said plaintiff did not intend by the signing of said papers that the defendant should have the right to purchase said real estate or to lease said real estate for any term of years beyond the lease of the said Itabashi without his further assent to such subse-

quent lease; that, after the signing of said papers, one copy of the same was left with the said plaintiff and the other taken by the said Phillips for the purpose of placing his notarial seal thereon; that within a few days thereafter the said Phillips, having placed his seal upon the paper taken by him and having had the same recorded, returned a copy of said paper to the said plaintiff and procured from the plaintiff the copy of the paper left with him; that the said plaintiff at all times believed, and had good cause to believe, that the paper signed by him contained only the matters and things to which he had agreed and assented, and that he did not have cause to believe, and did not believe, that said papers required him to sell the real estate therein described, or to lease it for a term subsequent to the lease to said Itabashi; that when said paper was returned to the plaintiff, the plaintiff deposited the same in a trunk in his home, and did not at said time, or prior to said time or subsequent to said time, know or learn of the true and real contents of said instrument until in or about the month of February, 1914, and that said pretended agreement was and is therefore in fraud of plaintiff's rights."

We have read the record with unusual care because of the novel features presented, and we agree with the trial judge that neither the president of appellant nor his attorney was guilty of any conscious fraud upon the rights of respondent. They were seeking to obtain control of land that would in all probability be necessary in the future development of appellant's business. The contract seems fair on its face. It insures respondent a fair rental value so long as it is held under a lease, and a fair price if taken under the option to purchase. Taking the contract by its four corners, it cannot be said that it is unfair or is, in any respect, such a contract as a man of ordinary or even more than ordinary capacity, having regard for his own business welfare, would not have entered into. Nor is it urged that the contract is improvident.

Considering the elementary principles of equity, no reason whatever is shown for the overturning of the contract, unless it be found in the finding that respondent

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“ . . . as appears from the evidence and from his appearance and conduct upon the witness stand [is] a man of advanced years, poor eyesight, very hard of hearing, dull of comprehension, with meager training, and that he was worn out by the importunities of said Phillips and the said Mac-Michael, and the said papers as read to him by the said Phillips were not understood in their full purport, purpose and meaning.”

When one seeks to set aside a formal written contract upon the ground of fraud he must, as the court in the instant case told the jury, sustain his case by clear and satisfactory proof. We find no better statement of the law in any of the books than was made by the trial judge when instructing the jury:

“Fraud is the foundation of this action. The law presumes, which is a fact, that people, dealing with one another, deal honestly and fairly, and you are to go into this case with that presumption that the parties have dealt fairly and honestly with each other. In other words, never to presume that fraud has taken place. It must be proved to you by the party alleging it; that is, by the plaintiff in this case; by clear and satisfactory proof.”

We will consider the findings upon which the decree must rest, in detail. Respondent was “a man of advanced years.” There is no testimony to sustain this finding. Respondent had lived on the land since 1865. We do not find that his age is fixed definitely in the record, but he attended the district school from about 1867 or 1868 to 1872 or 1873. Respondent was in the courtroom at the time of the argument of this case, and we, too, have had the benefit of judging “from his appearance.” He appears to be a man of about fifty to fifty-five years of age. There is nothing in the record or his appearance to suggest senility. “Advanced years” mean nothing. Many of the world’s greatest men have turned the supreme accomplishment of their lives at a time when years, measured by numbers, sat heavily upon them. No neighbor or friend or observer from the wayside, has come with word or fact or opinion to sustain the inference the find-

ing bears that respondent, because of "advanced years," is weakened in body or mind, or is incapable of attending to his own affairs.

Neither do we find that respondent had "poor eyesight," or is "*very* hard of hearing," or "is dull of comprehension," or that "he was worn out with importunities." There is nothing in the record about poor eyesight, although there is some evidence from which it may be inferred that he is slightly deficient in hearing. But he makes no complaint that he did not hear all that was said, or that he did not comprehend the contract because he could not see. He says he cannot read. It, therefore, makes no difference whether his eyesight was good or bad. His complaint is that that part of the contract which provides for a renewal of the lease, for sale, and for arbitration was not read to him at all.

Nor do we find respondent to be a man of low mentality or dull of comprehension. He makes a fair witness; follows carefully, and in detail, the theory of his counsel. His testimony is not confused. He seems to appreciate the "finer points" of his case and can "spar" for advantage. He is the owner of, and in the active management of, a valuable farm, a part, or possibly all of which, he has leased to his profit. He has sold two rights of way over his land, one to the county, and one to a railroad company, in which all his legal rights were preserved. No one comes testifying that respondent is of low mentality or dull of comprehension, or otherwise incapable of attending to his business in a shrewd and careful manner. No guardian has ever been applied for to manage his affairs.

We would pervert every rule of evidence if we were to hold that the finding of low mentality or dullness of comprehension is sustained. Neither do we find anything to sustain the finding that respondent was worn out by the importunities of the president of appellant and his attorney. They were negotiating over a period of twelve hours, it is true, but there is as much force in this circumstance to sustain the theory

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that respondent was not rushed off his feet as that he was overcome and worn out by importunities. Much of the negotiations were with his mother. If he had attended to the matter, the whole thing might have been settled in an hour or two. That he did not, and that the whole of the twelve hours was not devoted to negotiations and importunities calculated to wear out this supposedly weak man, is evidenced by his own account of the day.

"They came at about nine or ten o'clock in the morning and stayed there all day long and had dinner and supper. They talked with me a little and with my mother—all through the day with her. I was working around the place and would come in once in a while and talk. The result was my mother said: 'For God's sake, Jim, don't be hard on them. They want to lease that little piece of land and you have got it leased to this Japanese and ought to let them have it, if you can fix it with the Jap.' I told them the Jap would not stand for it. MacMichael asked if he could fix it up with the Jap if I would lease it, and I said all right, and that was all the talk MacMichael and I had. . . .

"It was immediately after noon that I agreed to let him lease it from the Jap. I went out to work and MacMichael went up town and when he got back he had the papers on the table and Phillips was writing at one end of the table and MacMichael was writing at the other, and talking among themselves there. About between eight and nine o'clock at night Phillips said: 'We have got these papers ready now'; and he told me to go out and bring in the Japanese and he would get him to sign."

The court admitted a great deal of hearsay testimony tending to show that it was the "settled policy" of respondent not to sell any of his land during his lifetime. This would be error calling for a reversal if the decree depended on the verdict alone. We refer to it only because of the holding of the court that respondent would have repudiated his contract if he had consulted a lawyer. His only hope, if he had consulted a lawyer, was in the two things now relied on; that he was worn out by importunities, and that it was his fixed

policy not to sell any of his land. If he had made a full disclosure of the facts, a lawyer would have advised him that the testimony relied on to show a wearing out of the will by importunities would likely be insufficient to overcome a written instrument, and that the settled policy theory would not afford a legal ground for rescission.

The case, then, when reduced to its lowest terms, comes within two very simple rules. The one, that fraud alleged to have occurred in the procurement of a contract between competent persons must be proved by strong and convincing evidence, and that one who would repudiate a formal written contract as not evidencing the agreement of the parties must do so promptly and under circumstances consistent with good faith. These rules are so obviously applicable that they need no further discussion.

The contract was written in duplicate. It is admitted that respondent did not read it, but it was read in his presence. Now, granting that respondent was advanced in years, and had very poor eyesight, and was very hard of hearing, and was of low mentality, and was dull of comprehension, and could not read, he knew his infirmities at the time. Yet he put the contract, drawn, as he now contends, by parties with whom he did not want to deal and with whom he was impatient and who had admittedly talked about a sale and arbitration, in his trunk without asking any one to look it over. After ten days, he exchanged his copy for the one that had been recorded; put it in his trunk and never consulted it until appellant claimed its option, four years after the contract was executed. Yet all the time he knew appellant had paid \$250 to the Japanese for a sublease, and he was accepting rent for the property which he knew came from appellant. He knew that appellant was making valuable and permanent improvements on its adjacent property. He was no stranger to lawyers. He dealt through and with lawyers when he sold the rights of way over his land. One of the attorneys in the instant case, who lived in the town a quarter of a mile

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away, has, since 1911, "performed various legal duties" for respondent.

As against the failure to show a "conscious" intent to defraud, the failure of proof, and all the other circumstances bearing against the contentions of respondent, we have the one fact (if it be a fact) that he cannot read, and the contract was not read, in its entirety, to him. His testimony is overcome by the evidence of his adversaries, as well as by the circumstances and probabilities of the case.

As we said in *Sahlin v. Gregson*, 46 Wash. 452, 90 Pac. 592:

"If this judgment is permitted to stand, deeds and other written instruments have lost their chief virtue."

And in *Golle v. State Bank of Wilson Creek*, 52 Wash. 437, 100 Pac. 984:

"Furthermore, the failure of the respondent to read the deed or have the same read to him, under the circumstances disclosed by this record, shows such negligence on his part as to place him beyond legal or equitable relief. *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955."

Chaffee v. Hawkins, 89 Wash. 130, 154 Pac. 143, 157 Pac. 35, is also in point.

Reversed, and remanded with instructions to enter a decree in accordance with our former opinion.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 13802. *En Banc*. October 31, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Edward N. Sears et al., Appellant*, v. MITCHELL GILLIAM, *as Judge of the Superior Court for King County, Respondent*.¹

JUDGES—VACANCY—APPOINTMENT—TERM—ELECTION. Under Const., art. 4, § 5, providing that, if a vacancy occurs in the office of a judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, the election to be at the next general election and the judge to hold office for the remainder of the unexpired term, an appointee's term ends at the election or when the judge elected to fill the vacancy has qualified.

ELECTIONS—PRIMARY ELECTIONS—NOMINATIONS—OFFICE—JUDGES—SHORT TERM—DESIGNATION ON BALLOT—STICKERS—STATUTES. The primary election law being an exclusive means of selecting candidates and not an essential part of the general election law, and the auditor not being required to prepare a ballot for unexpired terms unless there is a filing therefor, a person cannot be nominated for an unexpired term of judge of the superior court by the use of stickers or the writing of names on the primary election ballot, where there has been no filing for such unexpired term and hence no notice to electors of such an office to be filled, as contemplated by Rem. 1915 Code, § 4843, requiring publication thereof; especially in view of Id., § 4842, which provides that, where there is a vacancy to be filled, candidates may announce themselves for either the long or short term and the ballots "shall be arranged accordingly;" since no elector may assume to use the ballot for the selection of a candidate for an office not designated on the ballot and for which no voting arrangement is made; and stickers may be used under Id., § 4843, only for offices designated on the ballot.

Certiorari to review a judgment of the superior court for King county, Gilliam, J., entered October 18, 1916, denying a writ of mandamus to compel the placing of relators' names upon the general election ballots as nominees for the office of superior judge. Affirmed.

Edward N. Sears and *Richard Gowan*, for relators.

Alfred H. Lundin, *A. M. Brackett*, *Wilmon Tucker*, *R. C. Saunders*, *Geo. H. Rummens*, and *C. K. Poe*, for respondent.

¹Reported in 160 Pac. 757.

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CHADWICK, J.—On the second Monday in January, 1915, Honorable John E. Humphries qualified as a superior judge for King county for the term ending the second Monday in January, 1917. On or about May 15th, 1915, Judge Humphries died, and John S. Jurey was appointed by the governor of the state to fill the vacancy. Judge Jurey qualified and has ever since acted as such superior judge.

Provision is made in the constitution for the appointment of a person to fill a vacancy occurring in the office of superior judge, and fixing the term of such appointed officer, which is until the next general election and until his successor is elected and qualified. At the 1907 session of the legislature (Laws 1907, p. 457), the direct primary law was adopted as the lawful method of nominating candidates for public office. In *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728, the court recognized that, under this state of the law, "there was indeed a short and a long term for which a judge might have been nominated. . . ."

The primary election for this year was held on the 8th day of September. There were no filings of candidates for the so-called short term, or the interregnum between the general election to be held on the 7th day of November, 1916, and the 8th day of January, 1917, at which time all persons elected at a general election for a full term are competent to qualify. Const., art. 4, § 5. Nevertheless, a certain number of the electors of the county of King, by writing the name of the office and term intervening between the election and the time when a regular term will begin, and the names of these relators, voted for these relators for the office of superior judge for the short term. Alleging themselves to be candidates regularly nominated as such, they sought remedy in the lower court by way of mandamus to compel the county auditor to place their names upon the general election ballot, and to give notice of such election for the time provided by law. The writ was denied, and the case is brought here for

review. A right conclusion rests upon a construction of the constitution.

"If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term." Const., art. 4, § 5.

This section of the constitution was construed in *State ex rel. Linn v. Millett*, 20 Wash. 221, 54 Pac. 1124. Honorable Charles Ayer was elected at the general election held in November, 1896, to the office of superior judge for Thurston county for the full term beginning the following January. He qualified and continued to discharge the duties of his office until his death, which occurred in March, 1898—a time, as will be noticed, prior to the regular biennial election intervening between the commencement of the term of his office and its ending, which, under the constitution, would be in January, 1901. Honorable Byron Millett was appointed to fill the vacancy. He was commissioned to hold the office "until the next general election." This was the limit of the governor's authority. At the next general election (inasmuch as we are treating an office having a term of four years, we shall call the intervening election a biennial election), Linn received a majority of the votes.

The question arose as to whether he was entitled to the office immediately following a declaration of the result of the election or whether his right to fill the "remainder of the unexpired term" began the second Monday of the succeeding January. Linn qualified and demanded the office. Millett refused to vacate, and the issues, as just stated, were submitted to the supreme court upon Linn's application for a writ of *quo warranto* to try title to the office. The decision of the court was rested squarely upon that part of art. 4, § 5, which we have quoted. After stating the issue:

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"The respondent's position is that since, under the constitution, the different state officers are required to qualify on the second Monday in January succeeding their election, the relator in this case is not entitled to take office until such time; while the relator's position is that having been elected to fill an unexpired term, he is entitled to qualify and take office as soon as the result of such election has been declared."

The court said:

"We think the relator's position is well taken, and that the respondent's position cannot be maintained. The provision of the constitution which fixes the second Monday in January succeeding their election as the time when the different state officers, including superior judges, shall qualify, relates exclusively to original terms or terms beginning in January following the election; while the provision of § 5, art. 4, *supra*, which controls this case, applies only to cases where a vacancy exists, and the party elected is to serve the remainder of a term then current. The commission of the governor only entitles the holder to retain office until his successor is elected and qualified, and the word "remainder," as found in that section, relates to the term existing at the date of the election, not to a term beginning some months later. We have in this state biennial elections. If respondent's position is correct, and a vacancy should occur at any time within two years prior to the last election preceding the commencement of a new term, the provision of the constitution referred to, which requires a successor to be elected at the next ensuing election, would be meaningless, because, if he could not qualify until the January following his election, it would follow that the term would have already expired, a condition which we think is not contemplated by any fair construction of the constitution, and certainly not within the letter of it."

A related question was considered by the court in *State ex rel. Murphy v. McBride*, 29 Wash. 335, 70 Pac. 25. In the discussion following, the court held that the provision of the constitution fixing terms applied only to judges who had been elected; that

"There is no limitation, either express or implied, upon the legislature to make appointive terms extend to an election. The limitation is that, where a vacancy occurs which extends

beyond an election, then an appointee shall hold until the next succeeding general election, and until the qualification of a judge to fill the vacancy. . . .

"The term of an appointive judge, therefore, is not fixed, except that it cannot extend beyond an election and the qualification of his successor, or to the end of the term. When the term of judges elected was fixed at six years, it was intended thereby to distinguish elected judges from appointed judges, and to fix the terms of elected judges for a definite time, and to limit the terms of appointed judges to the next election. Within that limit the legislative power is complete. It may provide for a term of any length of time up to the succeeding general election. This term is appointive. But if a vacancy is created which extends beyond an election, the provisions of the constitution apply, and the legislature has no authority to change or modify the 'terms' therein contained. The act in question does not attempt to change or modify the terms of judges elected. It undertakes to create a vacancy and to terminate the vacancy, at a fixed time before an election can take place, and before an elective term may begin; and this, we hold, may be done, because there is no fixed constitutional appointive term."

It is plain, therefore, that if a person is appointed to fill a vacancy occurring in the office of superior judge before the next succeeding biennial election, his term is limited to the next general election, and the one elected to fill the "remainder of the unexpired term" is entitled to the office from the time of his election and qualification without reference to the time fixed for the beginning of regular terms. On the other hand, it is plain that, if a vacancy occurs between the biennial election and a general election when superior judges are to be selected (*State ex rel. Dyer v. Twichell*, 4 Wash. 715, 31 Pac. 19), the one holding by appointment holds only until "the election and qualification of a judge to fill the vacancy . . . which election shall be at the next succeeding general election."

Judge Jurey was appointed after the last biennial election, and before the oncoming general election; consequently his term, as appointee, ends at the general election, or when

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a judge is elected to fill the vacancy and has qualified, or, as it is further and more exactly stated in the constitution, for the remainder of the unexpired term; that is, the term for which Judge Humphries was originally elected. Unless "a person" is elected to fill the remainder of the term—that which we call the short term—Judge Jurey will continue in office until the one elected can qualify for the regular term, which will be in January, 1917.

The remaining question is whether the relators have been nominated, and can insist upon being candidates, for the unexpired term, the time elapsing between November 7, 1916, and the second Monday in January, 1917.

There were no filings for the office of superior judge for this short term. Relators claim only as the recipients of certain votes cast at the primary election. That they may not now insist upon the right to go upon the general election ballot seems evident for the reasons that we shall proceed to enumerate. The direct primary law was adopted as an efficient and, except as qualified therein, an exclusive means of selecting candidates for the offices created by the constitution or defined by statute. Its only purpose ". . . was to select candidates whose names shall appear on the official ballot."

"It is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office to be voted for at the general election. . . . It is a "process of selection to determine the candidates whose names shall appear upon the ballot." *State ex rel. Zent v. Nichols, supra.*

By the same authority, it is held that the primary election law is not an essential part of the general election law. Hence it follows that no duty rests upon the county auditor to prepare a ballot for unexpired terms unless there is a filing for such unexpired term. That the legislature had in mind that a nomination for an unexpired term depended upon a filing, and that it should not be left to the concern of the voter in the absence of a filing, is sustained in a degree by reference

to § 1 (Laws 1911, p. 489; Rem. 1915 Code, § 4842), of the primary law, which provides, in terms, that, where there is a vacancy in the office of judge, candidates may announce themselves for either the long or the short term, "and the ballots shall be arranged accordingly," being mindful, as we must presume, that if there were no announcements, the vacant office would not be referred to on the ballot and, as the constitution says, the appointed judge would hold over until his successor was elected and qualified. The ballots are "arranged accordingly," that is, describing constitutional and statutory offices to be filled for full terms and such unexpired terms as may have been the subject of announcement. It follows that no elector may assume to use the ballot for the selection of a candidate for an office not designated upon the ballot and for which no voting arrangement is made. We are further sustained in our thought that this must be so by a consideration of the whole act, especially § 8 (Laws 1915, p. 181; Rem. 1915 Code, § 4843).

The law seems to contemplate that the people shall have full notice of the primary election and of the offices to be filled; that the auditor shall "publish the names of all persons for whom nomination papers have been filed;" that "the names of all candidates for the office of supreme and superior court judges shall be published and posted in a separate list without party designation." The purpose of the primary law is not to create offices or to fill them; only to select candidates to be voted for at the general election. It emphasizes the personal equation and seeks, by positive provisions, to give notice of the names of men who aspire to office, rather than to emphasize the office itself. It is true that names may be written in, or stickers may be employed (Laws 1915, p. 181, § 8), but this is so only where the primary ballot calls for the selection of a candidate for an office or an unexpired term named in the ballot and of which the public has had notice.

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If any one aspires to fill an unexpired term existing because of a previous vacancy, he is not without remedy. He may file for the unexpired term, and compel, by appropriate proceedings, the submission of his candidacy. He cannot, without previous announcement, compel his nomination unless the people have had notice that there is an office to be filled.

It follows, there being no announcements of candidacy, and therefore no notice to the public, that no one will be elected to fill the unexpired term for which Judge Humphries was elected and of which Judge Jurey is now the incumbent. Nor does it follow that the office will be vacant. By the terms of the constitution, the incumbent will hold the Humphries' term until a successor to that term is elected and qualified. There being no candidates selected in the manner provided by law, and the time having passed when there can be, the obvious conclusion is that there is no vacancy to fill, for, by the fundamental law, Judge Jurey may, if he so will, continue to discharge the office until the one who may be elected to succeed to the full term is able to qualify, which will be on the second Monday of January, 1917.

It may be that what we have said may seem to be out of time with the act of 1911 (Laws 1911, p. 614, § 2; Rem. 1915 Code, § 9043-1), the constitutional provisions with reference to supreme and superior court judges being identical. It is there provided:

"A person elected judge of the supreme court to fill a vacancy for an unexpired term shall not qualify for office until the second Monday in January succeeding his election," indicating that, if a person was elected for the short term, he could not qualify until the succeeding January; that a person being elected, the term of the appointee would, for that reason, end; and that a vacancy would result notwithstanding an election for the unexpired term.

It would not follow. If such were the law, the one elected might be called upon to vacate the office on the day fixed for

his qualification in favor of one who had been elected for the regular term, being on the second Monday in January succeeding his (the candidate for the short term) election. If this act be treated as a limitation within which a judge, who has been elected to fill a vacancy, shall qualify, it might be sustained, but if it be taken as a legislative construction of the constitution, it cannot be, for the right to the unexpired term after election comes from the constitution. The term is continuing, and cannot be limited or abridged by either the legislature or the court. The legislature cannot limit the term of an officer duly elected to an office having a term defined in the constitution. *State ex rel. Murphy v. McBride, supra.*

Much of the argument was given over to the question whether the election to fill a vacancy occurring in the office of superior judge was general or special. With that, we are not free to concern ourselves. The constitution provides that all such elections shall be at the next succeeding general election. It does not say a special election shall be held at the time and place general elections are held, but is careful, as it seems to us, to exclude the thought that judicial officers can be voted for at any other than general elections. Otherwise, it would have provided for a special election to be held immediately upon the happening of a vacancy, rather than give the power of appointment to the governor pending such election.

We hold that the relators are not entitled to have their names printed on the official ballot, and that there is not and, from the failure to nominate in the manner provided by law, cannot be, a vacancy for the unexpired portion of Judge Humphries' term.

MORRIS, C. J., MOUNT, PARKER, MAIN, HOLCOMB, ELLIS, and FULLETON, JJ., concur.

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Opinion Per MOUNT, J.

[No. 13812. Department Two. October 31, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Edgar G. Mills, Plaintiff, v. I. M. HOWELL, as Secretary of State, Respondent.*¹

ELECTIONS—PRIMARY ELECTIONS—NOMINATIONS—"CONTEST"—TIME FOR FILING—STATUTES. Under Rem. 1915 Code, § 4829, providing for the correction of any error or wrong in the placing of names on the primary election ballot or the failure or neglect of any duty by any election official, upon the filing of an affidavit in the supreme or any superior court, and that any candidate who may desire to contest the nomination of any candidate may proceed by such affidavit so presented, provided the affidavit is presented within five days after completion of the canvass of the votes and not later, a proceeding in mandamus to require the secretary of state to certify the name of a candidate along with the names of several other candidates who admittedly received the requisite number of votes to go upon the ballot, is a "contest" of the nomination, and must be commenced within the five days limited, or it is too late.

MANDAMUS—LIMITATIONS—MERITS. Where a mandamus is filed too late, the merits will not be examined to settle disputed questions of law.

Application filed in the supreme court October 26, 1916, for a writ of mandamus to compel the secretary of state to certify the relator's name as a nominee for the office of supreme judge. Denied.

J. G. Dunaway, W. D. Lane, and John T. Casey, for relator.

The Attorney General and L. L. Thompson, Assistant, for respondent.

MOUNT, J.—This is a proceeding in mandamus to require the secretary of state to certify the relator's name to the several county auditors in the state as a nominee for judge of the supreme court. It is alleged in the petition, that the

¹Reported in 160 Pac. 760.

relator was a candidate at the primary election for that office; that, at the said election, there were 565,103 votes cast for judges of the supreme court, and that 282,552 votes is a majority thereof; that the following candidates received the following number of votes:

Emmett N. Parker.....	124,218
Mark A. Fullerton.....	124,103
George E. Morris.....	119,897
Edgar G. Mills.....	109,699
C. E. Claypool.....	87,186

that none of the candidates received a majority of the votes cast; that the secretary of state has arbitrarily and unlawfully certified that there were only 237,794 votes cast for the offices of judges, and that none of the candidates have received a majority of said votes, and the respondent, Howell, arbitrarily and unlawfully refuses to certify the name of the petitioner as a nominee, and has certified that the first three candidates named have received a majority of the votes, and are therefore entitled to go upon the election ballot without opposition.

This petition was filed on October 26, 1916, and an order to show cause was issued against the secretary of state, who makes a return to the effect that, in accordance with the provisions of Rem. 1915 Code, § 4828, the state canvassing board, composed of the secretary of state, the state treasurer, and the state auditor, met in the office of the secretary of state, at Olympia, on the 17th day of October, 1916, for the purpose of canvassing the returns of the primary election held on September 12, 1916; that the said canvassing board completed the canvass of the returns on October 17, 1916, and on that day prepared and filed with the respondent a certified statement showing that the total number of votes cast for judges of the supreme court did not exceed 235,459 votes; that the candidates Parker, Morris, and Fullerton received a majority of the votes cast, and were therefore entitled

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to go upon the election ballot for the November election unopposed; that thereafter, as secretary of state, he certified to each and every county auditor in the state these names to be placed upon the ballot.

The *Attorney General*, representing the respondent, contends that this application, being filed nine days after the completion of the canvass of the returns of the primary election by the state canvassing board, was filed too late, under the provision of § 4829, and that this court now has no jurisdiction to determine the merits of the application. This contention must be sustained. Section 4829, Rem. 1915 Code, provides:

“Whenever it shall appear by affidavit to any judge of the supreme court or superior court of the county that any error or omission has occurred or is about to occur in the printing in the name of any candidate on official ballots, or that any error has been or is about to be committed in printing the ballots, or that the name of any person has been or is about to be wrongfully placed upon such ballots, or that any wrongful act has been performed or is about to be performed by any judge or clerk of the primary election, the county auditor, canvassing board or member thereof, or by any person charged with a duty under this act, or that any neglect of duty by any of the persons aforesaid has occurred, or is about to occur, such judge shall, by order, require the officer or person or persons charged with the error, wrongful act or neglect, to forthwith correct the error, desist from the wrongful act, or perform the duty, and to do as the court shall order, or to show cause forthwith why such error should not be corrected, wrongful act desisted from, or such duty or order not performed. Failing to obey the order of such court shall be contempt. Any candidate at such primary election who may desire to contest the nomination of any candidate for the same office at said primary election may proceed by such affidavit so presented: Provided, that such affidavit may be presented within five days after the completion of the canvass by said canvassing board, and not later, and the candidate whose nomination is so contested shall, by order of such judge, duly served, be required to appear and abide by the orders of the court to be made therein.”

The record shows that the canvassing board completed the canvass of the returns in the office of the secretary of state on the 17th day of October, 1916, and filed its report on that day. This application was not presented to this court until the 26th day of October, 1916, or nine days after the completion of the canvass by the state canvassing board. The statute above quoted provides that "such affidavit may be presented within five days after the completion of the canvass by said canvassing board, and not later . . ." It is plain, therefore, that the relator in this case has not filed his application within the time limited by statute. The relator contends that he is not contesting other nominations for the same office, but it seems quite clear that this is a contest for the nomination. The word "contest" used in this statute refers, of course, to the causes for contest which are named in the first part of this section. If the canvassing board, or any officer named therein, has made an error in the count, or has done wrongful or negligent acts to the detriment of any candidate, that would be reason for contest, and the word "contest," as used in the provision above referred to, clearly relates to the causes therefor, as therein stated. It seems too plain for argument that the relator here is contesting for the nomination, even though he is not contesting the fact that others were also nominated. The limitation of five days was placed within this statute for a good reason. Under the provision of Rem. 1915 Code, § 4800, it becomes the duty of the secretary of state to certify to the clerk of the board of county commissioners of each county within the state the names of candidates nominated for state and district offices. This must be done not less than twenty days nor more than thirty days before a general election. After nominations are made, tickets must be printed and distributed to the various voting precincts throughout the state. This necessarily requires time, and as the time is short between the date of the canvass of the primary election returns and the date of the election, it becomes necessary to hasten the time when con-

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tests of any kind may be instituted, and the legislature concluded that five days' time after the canvassing board had made its report was ample time within which contests might be instituted, and they therefore said that these contests "may be presented within five days after the completion of the canvass by the canvassing board, and not later" If contests were delayed after that time, and may be brought at any time before the election, the result might follow that no election could be had upon important offices at the November election. The fixing of this five-day limitation was a reasonable one, and unless contests are instituted within the time, the courts have no jurisdiction thereover. *State ex rel. Socialist Labor Party v. Nichols*, 51 Wash. 79, 97 Pac. 1087.

Counsel for the relator insist that, if we should conclude that the application was filed too late, we should examine into the merits of the case in order to settle disputed questions which arise upon the primary law. Were we to do this, the result would be simply dictum and of no binding force.

The relator certainly knew that he must file his application within the five days' time, and if he was satisfied that he had a meritorious case, he no doubt would have done so. Not having done so, this court cannot determine questions over which it has no jurisdiction.

The writ is therefore denied.

MAIN, HOLCOMB, and ELLIS, JJ., concur.

CHADWICK, J. (concurring).—Without taking issue with the argument made by the majority, it seems to me that there are other and more controlling reasons for denying the petition of relator. The relator did not receive a majority of the votes cast, or if he did receive such majority, he is not, under the law, entitled to have his name placed upon the general election ballot. There has been much, and it seems to me unnecessary, confusion in considering the question of the majority of votes cast with reference to judicial offices. The confusion comes from a disposition to treat the words "ma-

jority of the votes cast" as synonymous with a majority of all the ballots, that is to say, the paper ballots cast by the electors.

The word ballot, in the sense in which it has thus been employed, is not in the statute, and cannot be read into it by any right rule of construction. It might be so held if there were but two candidates running and one to elect, but from the nature of things, the words "majority of the votes" cannot be held to be a majority of the paper ballots cast, when there are several candidates and several places to be filled and there is no compulsion or duty upon the voter to vote for the full number to be elected. If we were to accept the terms as synonymous, we would be compelled to say that a ballot, if the voter voted for two names, would be two-thirds of a vote, and if he voted for one name, one-third of a vote. Such a construction would lead not only to the ridiculous, but to the impossible as well.

Taking, therefore, the plain words of the statute, "a majority of the votes cast," every individual expression of the elector's will is a vote. Each vote cast for a candidate is a vote. It is admitted that there were individual expressions of the electors as follows:

Judge Parker	124,218
Judge Fullerton	124,103
Judge Morris	119,897
Edgar G. Mills.....	109,699
C. E. Claypool.....	87,186

Loosely considered, it may be said that a candidate, where three are to be elected, is running against the field, but it cannot be so, for that would be running one candidate for *one* of the *three* positions, against, not one other place or candidate for the same place, but against *two* other places and all candidates. He would be against three fields.

For the purpose of the argument, we may assume that the supreme court is a body divisible into nine parts. Three parts are to be filled. A certain number of the electors regis-

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ter their choice for Judge Parker for *one* of these places. It does not follow that, because they vote for two other men for two *other* places, they have cast either one or two votes against Judge Parker. The candidate has no interest in the other places. Nor has the elector who votes for Judge Parker any intention of reducing his vote, or which is the same thing, creating by his vote a standard that will record his vote for others, or any part of it, against the affirmative expression of his will. It follows, by this reasoning, that if there are two candidates and one received more votes than his opponent, he alone is entitled to go upon the general election ballot; and, by the same reasoning, if there are four candidates and two places to be filled, or six candidates and three places to be filled, that is to say, double the number of candidates, or a less number than double the number, the three receiving the highest vote receive a majority of all the votes cast.

To illustrate: There are three places to fill. Judge Parker has 124,218 votes. He is entitled, under the law, to the first place on the ballot unopposed, unless some one of the several candidates can show that he, as an individual, has a greater number of votes for the same place. Each candidate, in turn, must fail, for none can say, "I have more votes for any of the places to be filled than Judge Parker has."

The relator having received less than candidates Parker, Fullerton and Morris, is in no position to challenge their right to go upon the ballot as majority candidates.

Upon this theory, it will always be possible to determine a majority, whereas counsel for relator frankly admits that, upon his theory, either no one may receive a majority, or a greater number than one-half of the candidates (double the number being on the primary ballot) can receive a majority. To hold, where there are three nominations to be made, and there are six or a lesser number of candidates, all of the candidates, or any greater number than three, can receive a majority of the votes cast would be to violate every canon

of reason and common sense. It would be to say that the legislature provided for a selection by majorities, and then deliberately provided a scheme whereby majorities (although there were candidates equal to double the number or less of the places to be filled) could not be obtained.

We are bound to give life to all the words of a statute if it can be done. To hold to the contrary of my conclusion would write the word "majority" out of the statute, and invite the abuse of "plunking" for one candidate, whereas every elector should perform his full duty as a citizen and vote for three. The only way other than this to save one candidate for one place from measuring the votes for one place against the votes for all the other places would be to force the presumption that every elector had performed his whole duty and had voted for three men. There is no showing that they did not do so, and the presumption might be sustained in principle. Upon this theory, there were 565,103 votes cast. This, divided by three, the number of places to be filled, the votes—ballot votes—would be 188,367. A majority would be 94,184. Clearly, then, the three having the higher number of votes would be the nominees, for there cannot be more than three *majority* nominees upon the ballot, as I shall hereafter attempt to show. To rule otherwise would be to rule that two and two do not make four, or that a fraction may be more than the whole.

But if it be held by some strange process of reasoning that the relator did receive a majority of all the votes cast, he is still not entitled to have his name upon the ballot. The statute, Rem. 1915 Code, § 4842, reads as follows:

"When there are to be elected at any general election one or more judges of the supreme court, or of the superior court of any county, the candidates for each respective office whose names are to be placed on the general election ticket shall be determined as follows: The number of candidates equaling the number of judicial positions to be filled who receive the highest number of votes at the primary election, and an equal number of candidates for such positions, providing

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there are such candidates, who receive the next highest number of votes, shall be the candidates for such respective offices and their names shall appear on the general election ballot under the designation of such respective offices: Provided, however, that where any candidate for any such office shall receive a majority of all votes cast at such primary election for such office, the name or names of such candidates receiving such majority shall be printed separately on the general election ballot, under the designation 'Vote for,' and the name or names of no opposing candidate or candidates shall be printed on such ballot in opposition to such candidate or candidates, but spaces equaling the number of such majority candidates shall be left following such name or names, in which the voter may insert the name of any person for whom he wishes to cast his ballot."

If there be any doubt or uncertainty in the statute requiring construction, we are not compelled to go beyond the statute for a rule of construction. The primary election law, as we said in a former opinion, is intended to be a comprehensive scheme for the selection of candidates to go upon the general election ballot, and it is a familiar rule of construction that where one part of an act is ambiguous or uncertain, if the legislature has put a construction upon some analogous part of the act, the court will follow the legislative interpretation, to the end that, if confusion is to be prevented in the one case, it ought to be prevented in the other by the same method that has been suggested by the legislature.

In Rem. 1915 Code, § 4827, it is provided:

"In the event that there are more than one position of the same kind to be filled and more candidates of any political party receive majorities of the votes of such party cast at such election than there are positions to be filled, then in that event the number of candidates equal to the number of positions to be filled receiving the highest number of votes shall be the nominees of such political party for such positions."

True it is that this section refers to candidates of political parties, but, under the rules of construction that I have suggested, we may adopt it as a guide reflecting the will of the

legislature. And now, in this case, granting, for the sake of argument only, that the relator did receive a majority of all the votes cast (which does not appear upon the face of the returns), it leaves a greater number of candidates than there are positions to be filled, and the words "the one having a majority" of all the votes cast must be construed as the one having the greater number of votes cast, for it is obvious that, as between majority candidates, pluralities must prevail. Otherwise, the intent of the statute would be entirely overcome.

Another reason for saying that this provision has application to judges of the supreme and superior courts is that it could have no application to any other condition. Legislative positions are the only positions outside of the office of judges of the supreme and superior courts where there is more than one position of the same kind to be filled, and as to the legislative positions, it is elsewhere provided that the persons receiving a plurality of the votes are the candidates for the positions, and the only candidates for the positions, regardless of whether they received a majority of the votes or not. Hence this provision, in reality, can apply only to the non-partisan offices of judges of the supreme and superior courts.

The relator is not entitled to have his name upon the ballot, and the writ is properly denied.

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[No. 13798. *En Banc*. November 4, 1916.]

THE STATE OF WASHINGTON, *on the Relation of the Port of
Seattle et al., Plaintiff*, v. THE SUPERIOR COURT FOR
KING COUNTY, *Edward H. Wright, Judge*,
Defendant.¹

MUNICIPAL CORPORATIONS — POWERS — PORT DISTRICTS — DISBURSEMENT OF FUNDS—POLITICAL USE—STATUTES. Under the port district act (Rem. 1915 Code, § 8165-1 *et seq.*) authorizing the creation of port districts in the nature of a municipal corporation to engage in the business of building wharves, docks and harbor improvements and of operating and maintaining them, the Port of Seattle has no implied authority to spend money in a political campaign to defeat the passage of an act referred to the voters at a general election; since the district has only such power as is expressly conferred, or fairly incident to, and can be reasonably implied from, the powers granted, and such delegation of power cannot be presumed.

Certiorari to review an order of the superior court for King county, Edward H. Wright, J., entered October 18, 1916, enjoining the expenditure of funds of the port commission for political purposes, after a hearing before the court. Affirmed.

C. J. France, for relators.

Halverstadt & Clarke and *W. M. Whitney*, for defendant.

MOUNT, J.—This is a proceeding to review an order of the lower court granting an injunction in the case of *C. O. Qualheim, Plaintiff*, v. *The Port of Seattle and Robert Bridges, C. E. Remsberg and Carl A. Ewald*, as port commissioners of the Port of Seattle, Defendants.

The plaintiff in that case alleged that the legislature, in 1915, enacted a law amending the port district act of this state, being chapter 46 of the laws of that year. Laws 1915, p. 148 (Rem. 1915 Code, § 8165-15 *et seq.*). This amendment increased the number of port commissioners, and limited the bonded indebtedness of port districts of the first class.

¹Reported in 160 Pac. 755.

It is alleged that the port commissioners, for the purpose of defeating that enactment, are attempting to secure a nullification thereof by means of a referendum, and, for that purpose, the port commissioners have wrongfully, unlawfully, and without authority, expended large sums of the funds of said port district for the purpose of advertising, lobbying, and printing circulars, which have been scattered over King county and a considerable portion of the state; that the port commissioners, unless restrained from so doing, will expend other large sums of port funds for the purpose of carrying on a political campaign against said chapter 46; and that, by reason of said unlawful expenditures, the rate of taxation in King county will be increased, and the taxpayers of King county will be compelled to repay the money so unlawfully expended. It is also alleged that the plaintiff is a resident and taxpayer of King county. An application was made to the court below for a restraining order. After a hearing upon that application, the superior court of King county, on the 18th day of October, entered an order enjoining the defendant Port of Seattle and the port commissioners, their agents and servants, from expending, or causing to be expended, any of the funds of the Port of Seattle for the purpose of defeating the operation and effect of chapter 46 of the Laws of 1915, p. 148 (Rem. 1915 Code, § 8165-15 *et seq.*). This writ is to review that order.

The amendment to the port district act, being chapter 46 of the Laws of 1915, p. 148, was made the subject of a referendum under the constitution. It is now designated as referendum measure No. 8, to be printed on the official ballot, to be approved or rejected at the general election on November 7th of this year. By reason of the reference, this chapter has not yet become a law. This amendment is intended to increase the board of port commissioners from three to seven members, and provides that the total bonded indebtedness of any port of the first class shall be limited to two and one-fourth per cent of the assessed valuation of taxable property

in said district, but in no event shall the total bonded indebtedness ever exceed the sum of \$5,750,000.

The question presented is whether the board of port commissioners is authorized to expend public funds, raised by taxation, to defeat proposed legislation affecting that corporation. It is contended by the relators that, while the Port of Seattle is a municipal corporation, it is also a business corporation, and has the power to expend the money of the corporation to the best interest thereof. It is not contended, as we understand the brief of the relators, that there is any express provision in the law authorizing the port commission to expend money belonging to the corporation for political purposes; but it is argued, in substance, that, because this corporation is in the nature of a business corporation, engaged in commercial enterprises in competition with private individuals engaged in similar enterprises, and is conducting such business as an agency of the state, it has a right to expend its moneys in such way as the port commissioners deem for the best interest of the corporation; that, inasmuch as the powers of the corporation are general in their character, the power is implied to the trustees to apply the money of the corporation as, in their opinion, will best promote the affairs of the corporation. There can be no doubt that a corporation exercising powers of the state possesses only those powers expressly granted or such as are necessarily implied. The general rule is stated by Dillon on Municipal Corporations, at § 89, as follows:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . ."

In the case of *Tacoma Gas & Elec. Light Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655, this court said:

"It is a well settled rule of construction that a delegation of powers will not be presumed in favor of a municipal corporation unless they be such as are necessary to its corporate existence, but that the same must be clearly conferred by express statutory enactment. . . ."

And in *Young v. State*, 19 Wash. 634, 54 Pac. 36, this court said:

"It is well settled that public officers have, and can exercise, only such power as is conferred upon them by law, either statutory or constitutional, and that the government is not bound by the unauthorized acts of its officers or agents."

See, also, *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195; *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217. In this latter case, it is said:

"A municipal corporation is limited in its powers to those granted in express words, or to those necessarily or fairly implied in or incident to the powers expressly granted, and also to those essential to the declared objects and purposes of the corporation. 1 Dillon, Mun. Corp. (4th ed.), § 89; . . . It is a general principle that a municipal corporation cannot usually exercise its powers beyond its own limits, and if in any case it has authority to do so, it must be derived from some statute which expressly or impliedly permits it. *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601. The doctrine of *ultra vires* is applied with greater strictness to municipal bodies than to private corporations. 1 Smith, Modern Law of Corp., § 661. Upon this subject the supreme court of Minnesota has said:

"'A different rule of law would in effect vastly enlarge the power of public agents to bind a municipality by contracts not only unauthorized but prohibited by the law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent.' . . ."

It is plain from these authorities that, unless the Port of Seattle may be fairly implied to have the power to expend

money in the way here proposed, it has no such authority. It is not claimed that there is any express provision authorizing the Port of Seattle to expend money as is here attempted. The powers of the corporation, as defined by the act creating it, chapter 62 of the Laws of 1913, p. 202, are general in their character. They are stated as follows:

"To lay out, construct, condemn, purchase, acquire, add to, maintain, conduct, and operate any and all systems of seawalls, jetties, wharves, docks, ferries, canals, locks, tidal basins and other harbor improvements, rail and water transfer and terminal facilities within such port district." Laws 1913, p. 210, § 4 (Rem. 1915 Code, § 8165-4).

The port commissioners have, no doubt, implied authority to spend the money of the port for any of these purposes, but clearly the purpose for which this money is being spent is not, and cannot be, reasonably implied from the powers named. This corporation, the Port of Seattle, is a creature of the state. It is in the nature of a municipal corporation engaged in the business of building wharves and docks and harbor improvements and in operating and maintaining the same. Its powers are given by the state. If the state desires to limit those powers, the port itself and its commissioners have no special interest therein. They are simply agents of the state, and it seems absurd to say that an agent of the state may be permitted to expend money of the state for the purpose of defeating a proposed curtailment of the powers of that corporation by the state. No such power is expressly granted to the corporation, and it is not a necessarily or fairly implied incidental power to those expressly granted. It may be convenient for the port and the port commissioners to desire no change in its powers, but the curtailment of these powers, as is proposed, is clearly not indispensable, and for that reason alone the courts ought not to construe in favor of such corporations the power here sought to be exercised. In *James v. Seattle*, 22 Wash. 654, 62 Pac. 84, 79 Am. St.

957, this court held that the city of Seattle had no power to pay the expenses of councilmen on a visit to other cities to inform themselves concerning waterworks, street paving, terminal facilities, street lighting and other municipal matters. We there said:

“And we think the rule thus announced is the established one, and in consonance with all sound authority. The members of the city council are trustees. The body holds a trust for the inhabitants of the city. The terms of the trust are fixed by legislation, and no expenditure of money belonging to the city can be made without express authority, or implied authority by reason of a necessary granted power.”

See, also, *Minot v. West Roxbury*, 112 Mass. 1, 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592; *Frankfort v. Winterport*, 54 Me. 250; *Westbrook v. Deering*, 63 Me. 231; *Henderson v. Covington*, 77 Ky. 312; *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 639. In this last named case, it was said:

“The question of local self-government is one which has engaged the attention of the courts since the formation of the Union. A few states have adopted the view that the municipalities have an inherent right to local self-government not dependent upon legislative authority, and that this right was brought to this country from the rule adopted in the Anglo-Saxon countries from which our laws descended. This view is entertained by the courts of Indiana, Kentucky, and Michigan; while practically all the rest of the jurisdictions hold that municipal corporations have only such power as is conferred upon them by the legislature, and that the legislature, in the absence of constitutional inhibition, controls such municipalities absolutely. This is the view of the supreme court of the United States, which, in *Barnes v. District of Columbia*, 91 U. S. 540, held in substance that a municipal corporation was but a department of the state, and that the legislature could give it all the powers it was capable of receiving, or that it might deprive it of every power, leaving it a corporation in name only, and could create and recreate changes in its government as it chose. In addition to the overwhelming weight of authority, this is the

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view that has been taken by this court. In *Meehan v. Shields*, 57 Wash. 617, 107 Pac. 835, in discussing the constitutionality of the state aid road law and in commenting thereon, it was said:

“Our constitution is a limitation of power, and such rights and powers of local government as are not conferred upon counties by the language of the constitution remain with the state and may be exercised by the legislature as the law-making power of the state. Rules and regulations for local county government and control, except as otherwise provided for in the constitution, are as much within the control of the state as those matters which are more general and state-wide.”

We are of the opinion, therefore, that the Port of Seattle and its commissioners have not authority to expend the money of the corporation in an endeavor to defeat any law which has been passed by the legislature and referred to the people for approval or rejection. The approval or rejection of the amendment proposed to the Port of Seattle is a matter of no concern to the port itself, or its commissioners. As stated above, this corporation is a branch of the state government, municipal in its character, and its authority is limited to the powers expressly granted or necessarily inferred from express grants. If the port commissioners may take the money of the port, acquired by taxation upon property within the district or otherwise, for political purposes, or purposes other than those for which the port was organized, then there is no limit upon the port commissioners in expending the money of the port. The commissioners might determine that the best interests of the business of the port required that the individual members of the commission be perpetuated in office, and, because of that reason, use the funds of the port to insure their own election. We are clearly of the opinion that, when the port was created, no thought was held by any person that the money raised by the port could be used for political purposes, or any purpose other than for the direct use of the port and its business.

We find no error of the lower court in granting the injunction. The order is therefore affirmed.

MORRIS, C. J., MAIN, ELLIS, HOLCOMB, CHADWICK, and PARKER, JJ., concur.

[No. 12964. *En Banc*. November 10, 1916.]

ERNEST NAPOLEON ROBERTS, *Respondent*, v. PACIFIC
TELEPHONE & TELEGRAPH COMPANY, *Appellant*.¹

LIMITATION OF ACTIONS — RUNNING OF STATUTE — INSANITY OF PLAINTIFF—BURDEN OF PROOF. In an action for personal injuries, in order to toll the statute of limitations by reason of insanity, the burden of proof is upon the plaintiff to show by clear and convincing evidence that on the day he received his injuries, he became and was insane and incapable of transacting ordinary business and that the condition continued for the period necessary to toll the statute.

DAMAGES—ACTIONS—INSTRUCTIONS—INSANITY OF PLAINTIFF. In an action for personal injuries alleged to have caused plaintiff's temporary insanity, brought by him as a competent person in his own name, the jury should be instructed that they cannot find the plaintiff now insane, when, from his testimony, the jury might have found him insane at the time of the trial and thus enhanced his damages.

SAME. In such a case, it is error to instruct that insanity once established is presumed to continue until the contrary is shown, where that was contrary to the allegation of the complaint and would permit plaintiff to begin an action as a sane man and recover damages on the ground that he was insane.

SAME—EVIDENCE—INSANITY—COMMITMENT. Upon an issue as to plaintiff's temporary insanity caused by injuries, his commitment to the state insane asylum, conformable to Rem. 1915 Code, § 5953, is admissible in evidence as to his insanity at that time.

SAME—INSTRUCTIONS—INSANITY. In such case, an instruction as to the presumption of the continuance of insanity should be limited to the period of his confinement therefor, and the jury should be told that the commitment papers were not conclusive long prior to the time of the commitment.

¹Reported in 160 Pac. 965.

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LIMITATION OF ACTIONS—RUNNING OF STATUTES—INSANITY OF PLAINTIFF—BURDEN OF PROOF—INSTRUCTIONS. In an action for personal injuries, in which the plaintiff sought to toll the statute of limitations by reason of insanity caused by the injuries, the jury are properly instructed that, if the plaintiff has established insanity of a fixed and settled nature at a certain time by a preponderance of clear and convincing evidence, the condition is presumed to continue, and the burden would be upon the defendant to establish his subsequent sanity, so that he was able to know and comprehend the nature of his acts and able to transact and understand ordinary business.

RELEASE—AVOIDANCE—INSANITY—INSTRUCTIONS. Upon an issue as to plaintiff's insanity at the time of signing a release of damages, an instruction that his mental incapacity must be established by clear and convincing evidence need not be accompanied by the further condition "that defendant had at such time knowledge or notice of such fact"; since, if his lack of capacity was so great as to render him incapable of understanding the effect of the release, or if his mental incapacity did not go to that extent, the defendant had notice of his mental condition when it procured the release.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$24,000 for personal injuries is so excessive as to indicate the influence of passion and prejudice, where plaintiff, 28 or 29 years of age, had the small bones of his hand broken, and received a gash over his eye, some injury to his ankles and knees of a temporary nature, and to the back of his head, impairment of eyesight, and temporary mental derangement, but was able to work at his usual wages in less than two months.

MORRIS, C. J., MOUNT, and MAIN, JJ., dissent in part.

FULLETON, J., dissents.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered January 20, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a lineman through the breaking of a telephone pole. Reversed.

Post, Avery & Higgins, for appellant.

Robertson & Miller and *E. W. Robertson*, for respondent.

HOLCOMB, J.—Respondent was a lineman working for appellant near Pomeroy, Washington, in reconstruction of a telephone line. A pole which he had climbed broke and re-

spondent fell with the pole, the cross-arm at the top pinning his head to the ground and knocking him unconscious for a short time. Some of the bones in his left hand were broken, his ankles were hurt, there was a cut over his eye, the back of his head was bruised and swollen, and his eye was bloodshot. The accident happened September 15, 1910. Suit was brought January 12, 1914, or approximately four months after the expiration of the period of the statute of limitations. Various grounds of negligence are alleged in the complaint, but the ground relied upon by respondent was that, at the direction of the foreman of construction, another lineman cut the wires upon a near-by pole, and that such wire cutting caused the pole upon which respondent stood to break and fall. The complaint alleges that the plaintiff became and was insane continuously from the time of the injury until in September, 1913, and that he had been an inmate of the asylum for insane at Steilacoom for about four months. It is not contended in the complaint that the respondent was insane at the time of the commencement of the action, and there was no guardian *ad litem* appointed to sue for him.

Appellant, in its answer, admits that the respondent was in the employ of appellant, denies all allegations of negligence, and affirmatively alleges the following: (1) That, on December 12, 1910, or three months after the accident, plaintiff settled, satisfied, and released all claims and demands arising out of the accident, for the sum of \$135 then paid to him; (2) that the action was commenced more than three years after the cause of action accrued and is barred by the statute of limitations; (3) that there was contributory negligence and fault on the part of the respondent; (4) that the respondent assumed the risk; (5) that the injury was caused by the negligence of a fellow servant. Respondent in reply alleges in respect to the release that, at the time of executing it, he was incapable of transacting business or knowing the effect of such an instrument because of his weakened mental condition, and that the instrument was obtained from him

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fraudulently and without consideration; and further alleges that he was insane continuously from the time of the accident until September, 1918.

Twenty-eight errors are assigned by appellant, and the printed abstract of the record comprises 752 pages. The errors assigned, however, invoke principally, and this opinion will deal only with, the questions of the running of the statute of limitations, of the validity of the release, of the refusing and giving of instructions to the jury, and of the excessiveness of the verdict. There was a verdict for respondent for the sum of \$24,000. Appellant unsuccessfully moved for a directed verdict in its favor, for judgment notwithstanding the verdict, and for a new trial.

As the action was not brought until January 12, 1914, the injury having occurred September 15, 1910, and approximately four months more than the period of the statute of limitations of such actions had run, and as the release is claimed to have been executed on December 12, 1910, within three months after the accident, it is unnecessary to discuss separately the question of the validity of the release and the tolling of the statute of limitations. They are co-ordinate and co-related. If respondent was insane for a period of time sufficient to toll the statute of limitations to within three years of the commencement of the suit, then the period of his insanity would cover the time of the execution of the release so that the same would not be binding upon respondent. And, conversely, if he was lucid and mentally competent at any time to transact ordinary business, the statutory period must start running from that time.

The court submitted to the jury three special interrogatories, the first of which was as to whether plaintiff executed the contract of settlement and release in question, to which the jury answered, "Yes." The second interrogatory was: "If you answer the first question 'Yes,' did the plaintiff at the time of signing the same possess sufficient understanding

Ed Talbott, to the ranch of the Talbotts near Plummer, Idaho. While in Spokane he wrote the following letter:

"Mr. Thos. H. Elson, District Supt. of Plant, 508 Fraternal Bldg., Spokane. Oct. 9, 1910.

"Dear Sir: While in the employ of P. T. & T. Co. under Foreman McDonald at Pomeroy, Wn., was injured first part of Sept. by pole breaking off at top of ground when wires were off of pole ahead of me; the pole I was on snapped throwing me to the ground, cutting large gash over left eye, breaking small bones in left hand; I sprained both of my ankles; they took me to Pomeroy in an automobile and put me under doctor's care where they left me five days then went back to camp, where I stayed ten days with the understanding that my time was to go on until I was able to go to work; came to my sister's in Spokane, 29th day of Sept. and have been with her ever since; they have pay me up until 28th of Sept., when left; can get you doctor's certificate as to my present condition or let the company's doctors examine me; am willing at any time it may be convenient to you; now Mr. Elson I don't want to have any trouble about this matter but I want what is right and justly my due, and I trust that you will, after making investigation and finding I have not misstated facts, see fit to continue me on pay roll until I am in condition to go to work, as my head has bothered me all the time but can not tell what will turn up, but wish to do the right thing, but if can not agree will see attorneys and see what I can do that way. Trusting to hear from you soon, I remain,

"Most respectfully,

"(Signed) E. N. Roberts, Plummer, Idaho."

It will be observed that this letter shows coherence and continuity of thought and reason, clearness of memory, and decisiveness of judgment. On November 11, 1910, respondent wrote another letter to the appellant which was equally intelligent, definite, decisive, and coherent, and in which he mentioned the time and place of the accident, the name of the foreman of the construction crew, and the name of the physician at Pomeroy who attended him, and requested that his claim be given attention. On about December 1, 1910, respondent and two of his brothers, one of whom was a line-

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man and the other a groundman working for the appellant, went to work for the appellant at Orondo, near Wenatchee. Respondent worked until December 12, 1910, when he came to Spokane at the request of an officer of the appellant who was looking after the claims against the appellant, and after some negotiations, he there made the settlement and signed the release before Mr. Higgins, in the office of appellant's counsel, receiving a check for \$135. Previous to this settlement he had received two other checks, one for pay up to the time of the injury, and one for pay up to the time he left camp after the injury, he having been kept on the pay roll until he left camp about the 1st of October, 1910. All of these checks he indorsed and cashed. After this settlement, appellant had no further knowledge of him until in February, 1912, when it received a letter from him written at Golden, Colorado. This letter was addressed to H. J. Tinkham, district superintendent of plant, and it also was a clear, intelligent, rational letter, stating that he had been unable to work since he worked for the company; that he had a doctor bill against him on account of his eye that was injured in the accident at Pomeroy, and would like to know if the company could not do something more for him; that all he wished was that his doctor bill be paid, and that he would give the address of his doctor or have him write the company as quick as he received answer to his (respondent's) letter. He stated also that he would like to have recommendation so he could go to work as quick as able; that he had no funds and he would like for the superintendent to give him a little consideration; signing his name E. N. Roberts, and giving his address as Box 623, Golden, Colo.

The Talbotts, his sister and brother-in-law, testified that they did not call in a physician for respondent while he was in Spokane in October, 1910, nor after they went to the ranch in 1911, or any other time. Mrs. Talbott testified that she did not know of plaintiff's writing any letters to the company or anybody connected with the company, in October,

November, or December, 1910, or any other time. She was shown the letter of October 9, 1910, and denied knowledge of its being either respondent's handwriting or his signature. She was shown the second letter, dated November 11, 1910, and stated that she did not see him write the letter and did not know whether it was respondent's handwriting or signature. She was shown the letter of February, 1912, written and mailed from Golden, Colorado, and denied any knowledge as to whether or not it was respondent's handwriting. Respondent himself denied that he knew whether or not it was his writing in any of the letters; that he did not remember of being in Golden, Colorado, in 1912. He admitted that the handwriting of the letter ostensibly written there looked like his, but said he did not know his handwriting. It is unquestionably written by the same hand that wrote the other two letters, which his relatives testified were copied by him in his own handwriting. It is also manifestly written by the same hand that indorsed the several pay checks and signed the release.

After the close of appellant's testimony, Mr. and Mrs. Talbott were recalled on rebuttal, and contradicted their previous testimony by testifying that Talbott, at the instance of his wife, drafted the letter of October 9, 1910, in their apartment in Spokane, and instructed respondent to copy it, and that respondent sat at a table across from Talbott and, without further assistance, instruction, or direction, copied the letter and Talbott mailed it; that as to the letter of November 11, Talbott drafted that letter and sent it to his wife to have her cause respondent to copy it at their ranch in Idaho. Mrs. Talbott testified to the same effect. It is peculiar as to the facts detailed in the first letter that James Roberts, brother of respondent, had not been in Spokane after the accident happened to respondent, and himself testified that he never saw his brother after he left the camp near Pomeroy until he saw him up at the ranch near Plummer, Idaho, in November, though Mrs. Talbott, his sister, testified

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that he had visited her house before the first letter was written. Where the Talbotts obtained the facts stated in the first letter, which goes into detail as to what happened to the respondent at the time of the injury and afterwards, is incomprehensible. No attempt, other than respondent's denial of recollection of it, was made to explain the writing of the letter from Golden, Colorado. It was written after the termination of the four months' period following the injury necessary to toll the statute of limitations. Even the copying of the first two letters, unassisted, as was testified to by the Talbotts, would seem an impossible accomplishment for a man who, as he claimed at the trial, had forgotten how to write as he was formerly able, and could only remember how to write *or read* very slightly. If these letters emanated from the mind of respondent, he was beyond question of sufficient sanity at any one of those times to transact ordinary business, which is the test of his competency. The letter from Golden, Colorado, of February, 1912, is unexplained except by himself in his testimony that he did not recollect of having written it and did not recognize the writing. If this letter emanated from his mind, he was beyond question at the time of sufficient sanity to know and understand his ordinary business affairs. Such being the case, it would indicate very strongly to a fair mind that he had been in the same condition of sanity previously, or at least that he had lucid intervals. Yet the jury, who were the triers of the facts, seem to have accepted his version of the writing of these letters and to have found in his favor upon all the issues of fact connected therewith.

In the fall of 1912, he again worked for appellant, assisting a crew of line repairers for a few weeks near Lind, Washington, with apparent ability to perform the duties. On May 12, 1913, in Seattle, he was placed in jail for something and was found there by his brother-in-law, Talbott, who swore to a complaint of insanity against him. An inquiry was had, and on that day he was committed to the asylum

for insane at Steilacoom. On August 4, 1913, a little less than three months afterwards, he was discharged therefrom as cured. In the record made by the physicians who examined him, it appeared that there was testimony that there was insanity or tendency to insanity in the family of respondent, a brother having been subject to epilepsy. Appellant requested the court to instruct the jury as follows:

"I charge you, as a matter of law, that, under the allegations of the complaint, you cannot find that the plaintiff is now insane or has been insane at any time since he left Steilacoom asylum, if you find he was ever in such asylum."

This request was refused, to which exception was duly taken. Since the complaint alleges, "that by reason of said injuries plaintiff's mind was affected and plaintiff became and was insane continuously from said time until his discharge from the asylum as hereinafter alleged," and since plaintiff brought his suit as a competent person in his own name, this instruction, or one covering the matter in substance, should have been given. It was proper to be given for the reason that the jury might have considered respondent insane at the time of the trial, from his testimony and that of others, and thus enhanced the damages awarded. The point is not covered by any instruction given by the court.

Appellant further requested the court to instruct the jury as follows:

"If you find from the evidence in this case that the plaintiff was, at any time in the year 1913, in Steilacoom asylum, I charge you that such fact shall not be considered by you in determining whether or not the plaintiff was to any extent mentally deranged in the years 1910, 1911, or 1912. You shall not allow the fact that plaintiff was in Steilacoom asylum at any time during the year 1913, if you find it to be a fact, to influence your minds in any manner whatsoever in determining the mental condition or capacity of the plaintiff in 1910, 1911, or 1912. I also charge you that the physicians' certificate or the answers to questions contained therein dated at Seattle in May, 1913, shall not be considered by you as evidence of any fact in issue in this case."

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The court instructed the jury on this subject as follows:

"If insanity has once been established, then the presumption is that insanity continues until the contrary is established by the preponderance of the evidence."

This instruction is proper where the allegation and the facts under the allegation show that the insanity is continuous and existing. But in this case the allegation was that the respondent was insane continuously until his discharge from the asylum. Respondent argues, however, that the complaint further alleged that, since the time of the injury, plaintiff's physical and mental vigor has been destroyed by reason of said injuries, and he has been unable to do any work of any kind; that he will continue to suffer during the remainder of his life great physical and mental pain. These allegations are inconsistent and, under the instruction given by the court, would permit respondent to bring and maintain his action as a sane man and recover damages on the ground that he was insane.

It is contended by appellant that the introduction of the commitment papers in the insanity proceeding, which was excepted to, was erroneous. We think not. The proceedings were conformable to the law in such cases (Rem. 1915 Code, § 5953), and were a valid adjudication of his competency at that time. The commitment papers were competent to show the existence of insanity in 1913 from May 12 or thereabouts to August 4, and also the discharge of respondent as cured. Prior to the inquisition and adjudication of his insanity, the presumption was that he was sane up to the time prior thereto when he was shown to have become insane. The commitment papers include the physicians' certificate and the answers to questions contained therein under their examination, and these were competent as tending to show upon what the physicians based their certificate. All of it was for the jury to weigh. Although it was *ex parte*, it was all competent as going to the question of insanity at that time, but not at any other time. *Giles v. Hodge*, 74 Wis. 360, 43 N. W. 163;

State v. Austin, 71 Ohio St. 317, 73 N. E. 218, 104 Am. St. 778; *Branstrator v. Crow*, 162 Ind. 362, 69 N. E. 668; *Calumet Elec. St. R. Co. v. Mabie*, 66 Ill. App. 235; *State v. Welty*, 65 Wash. 244, 118 Pac. 9; 16 Am. & Eng. Ency. Law (2d ed.), 606. The concluding sentence of the requested instruction was, therefore, erroneous as framed and should have further limited the inquiry to the period of established insanity. The jury should have been instructed, in effect, as requested, that the showing made to the examining physicians in May, 1912, was not conclusive as to insanity long prior thereto, or, dating as far back as September, 1910, of chronic or permanent insanity.

Appellant requested an instruction as to the effect of the statute of limitations, to the effect that, if there were any lucid interval in the mind of respondent at any time after the injury and at least up to January 12, 1911, during which lucid interval respondent was mentally capable of transacting any business, then the action would be barred under the statute and he could not recover any sum whatever; and to the further effect that the burden of proof is not on the defendant to show such mental capacity at any time during such period up to January 12, 1911, but upon the plaintiff to show such mental derangement or incapacity at all times from and including September 16, 1910, to January 11, 1911, and to establish the same not only by a preponderance of evidence, but also by evidence clear and convincing. Instead thereof the court gave instruction numbered five, a part of which has been hereinbefore quoted, as to the effect of the statute of limitations and the degree of proof required on behalf of respondent to avoid the operation of the statute, and continued as follows:

"A person is presumed to be sane until he is proved to be otherwise, and that the burden is upon the person claiming insanity to prove it by clear and convincing evidence; but that when insanity of a fixed and settled nature is once established by such evidence, it is presumed to continue until it

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is overturned by proof of sanity. You are, therefore, instructed that, if plaintiff established that he became and was insane on the day of the alleged injury, and such insanity was of a fixed and settled nature, it would be presumed that he continued insane until proven to be sane, and the burden would be upon the defendant to establish his subsequent sanity. Even though the plaintiff may have been insane on the day when injured, if it were established that he became and was sane on any subsequent day prior to January 14, 1911, then this action would be barred by the statute of limitations."

This was consistent and it instructed the jury that, if it was established that, at any time, plaintiff had been sane prior to January 14, 1911, the action would be barred. The difference in dates of two days is not erroneous and, as suit was brought on January 12, 1914, and four calendar months after September 15, 1910, would end on January 14, 1911, the time calculation of his Honor was correct. The advice to the jury that "*when insanity of a fixed and settled nature is once established by plaintiff by a preponderance of evidence and evidence that is clear and convincing . . . it would be presumed that he continued insane until proven to be sane, and the burden would be upon the defendant to establish his subsequent sanity,*" is also a correct statement of the law. 16 Am. & Eng. Ency. Law (2d ed.), 604; *Rogers v. Walker*, 6 Pa. St. 371, 47 Am. Dec. 470; *Gingrich v. Rogers*, 69 Neb. 527, 96 N. W. 156; *In re Brown*, 39 Wash. 160, 81 Pac. 552, 109 Am. St. 868, 1 L. R. A. (N. S.) 540; *State ex rel. Thompson v. Snell*, 46 Wash. 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191.

If insanity of a fixed and settled nature is once shown to exist in the actor, at a certain time, by evidence that is clear and convincing, it must be presumed to continue until a contrary state of sanity is made to appear by the adverse party. In the first place, the presumption of sanity has been overcome and insanity established by evidence clear and convincing. Undoubtedly the only correct rule would be that that

condition of insanity once established must be overcome, if at all, by the adverse party assuming the burden of showing that, at any subsequent time, the actor became and was sane. And rational conduct, rational acts, and business transactions at a given time may be shown to establish lucidity at such time, and if satisfactorily shown, are as cogent to establish such lucid periods as proof of habits, acts, and conduct of an irrational nature are to show insanity. It should be borne in mind that the only test is that, at such times, the actor was able to know and comprehend the nature and effect of his acts, and was therefore able to transact with understanding ordinary business; and that by a lucid interval is meant "not merely a cessation of the violent symptoms of the disorder, but a temporary restoration of reason such as to create responsibility for acts done during its continuance; restoration of the mental faculties to their original condition is not necessary; it is sufficient if there be such restoration that the person is able, beyond doubt, to comprehend and to do the act with such reason, memory, and judgment as to make it a legal act." 16 Am. & Eng. Ency. Law (2d ed.), 565.

These last principles were not requested by appellant to be given the jury for their guidance, inasmuch, probably, as it was its contention that respondent was at all times sane during the issuable period. The instruction given by his Honor, so far as it went, and in the absence of further request, was correct.

Upon the question of negligence and assumed risk, we think the court correctly instructed the jury under the facts. Those questions were properly submitted to the jury for their solution. There was evidence on behalf of respondent tending to show negligence, and his contributory fault or assumption of risk was a question of fact for the jury under proper instructions. We have examined the instructions in relation thereto and consider them proper.

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We do not agree that appellant was entitled to its requested instruction on the subject of avoiding the release. The substance and effect of the requested instruction, somewhat abridged, was given by his Honor in another instruction (No. 12), but a phrase of the one prayed, to the effect that not only the mental incapacity of plaintiff at the time must have been established by clear and convincing evidence (as was instructed), but also "that defendant had at such time knowledge or notice of such fact," was omitted, of which complaint is made. We do not concur with the rule laid down in *West v. Seaboard Air Line R. Co.*, 151 N. C. 231, 65 S. E. 979; *Id.*, 154 N. C. 24, 69 S. E. 676, and cases therein cited. We agree rather with the principle as stated in *Cooney v. Lincoln*, 21 R. I. 246, 42 Atl. 867, 79 Am. St. 799, as more just, to this effect: That if the plaintiff's lack of capacity at the time of making the release was so great as to render him incapable of understanding the effect of the instrument, or if his mental incapacity did not go to that extent, defendant had notice of his mental condition when it procured the release. See, also, *Rhoades v. Fuller*, 139 Mo. 179, 40 S. W. 760; *Orr v. Equitable Mtg. Co.*, 107 Ga. 499, 33 S. E. 708; *Bunn v. Postell*, 107 Ga. 490, 33 S. E. 707.

We consider the verdict, however, as grossly excessive and as necessarily given under the influence of passion and prejudice. Respondent was able to work at his usual wages in December, 1910, less than two months after his injury. He was twenty-eight or twenty-nine years of age. The permanent injuries which respondent under his evidence showed were an injured hand, some of the small bones of the left hand having been broken, a large gash over his left eye without any evidence of a broken bone, some injury to his ankles and knees of a temporary nature, an injury in the back of his head, and some impairment of sight in one eye, largely remediable by the use of proper glasses, and the possible, slight, temporary mental derangement, which became cured

in August, 1913, do not justify any such recovery as \$24,000. It is unconscionable to the extent of more than half that sum.

Upon the whole case, for the errors in giving and refusing instructions and the excessiveness of the verdict, we are of the opinion that appellant did not have a fair trial, and that a new trial should be granted.

Reversed and remanded.

PARKER, ELLIS, and CHADWICK, JJ., concur.

MOUNT, J. (dissenting)—The trial court should have directed a verdict for the defendant, because upon the whole evidence there can be no doubt that the plaintiff was perfectly sane when he executed the release. The testimony to the contrary, discredited as it was, is unworthy of serious consideration.

I concur upon the other points decided.

MORRIS, C. J., and MAIN, J., concur with MOUNT, J.

FULLERTON, J. (dissenting)—The questions of fact were for the jury. There was no error in the instructions. I am of the opinion, however, that the verdict was excessive, but the remedy for this is leave to take judgment for a lesser sum, not a reversal *in toto*. I therefore dissent from the judgment ordered.

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Syllabus.

[No. 13362. Department One. November 10, 1916.]

LOUIS J. HAAS *et al.*, *Appellants*, v. WASHINGTON WATER
POWER COMPANY, *Respondent*.¹

APPEAL—REVIEW—THEORY OF TRIAL—OBJECTIONS BELOW. Where the answer was treated at the trial as denying the allegation of negligence in a certain paragraph, it cannot be claimed for the first time on appeal that the same had been admitted by failing to deny such paragraph.

DISCOVERY—INTERROGATORIES—REFUSAL TO ANSWER—PENALTY—STATUTES—HARMLESS ERROR. Under Rem 1915 Code, § 1230, providing for the striking of the offending party's pleading for refusing to answer interrogatories and the rendition of judgment against him, it is not error to deny a motion for judgment at the trial for such refusal, where the moving party did not bring himself within the statute by moving to strike the pleading and the offending party was required to file an answer to the interrogatory before any evidence was introduced, and the failure to answer it earlier had no prejudicial effect.

ELECTRICITY—ACTION FOR INJURIES—ELECTRIC SHOCK—PROXIMATE CAUSE—QUESTION FOR JURY. In an action for injuries sustained through an electric shock, shortly after a stroke of lightning had broken defendant's high voltage transmission wires, whether the injury was caused by the act of the defendant in again charging the wires shortly after the shock, is for the jury, where experts expressed the view that a wet cross arm, upon which the broken wire rested, was a sufficient conductor to carry the excessive charge over the distribution wires to plaintiff's house and cause plaintiff's injury, although the same was disputed and there was vague evidence of a second stroke of lightning.

SAME—ACTION FOR INJURIES—ELECTRIC SHOCK—NEGLIGENCE—QUESTION FOR JURY. In an action for injuries through receiving an electric shock, after a break in the defendant's high voltage line, when defendant again turned on the current to test out the line, the negligence of the defendant is a question for the jury, where all the experts testified that the only practicable method of locating the trouble was to turn on about one-half of the normal voltage, and defendant's witness in charge of the power house, who was the only person who could testify on the subject, contradicted himself, first testifying that he turned on the full voltage and repeated it on cross-examination, but finally reduced it to less than half the

¹Reported in 160 Pac. 954.

normal voltage; especially where the defendant's answer to an interrogatory showed that the line was charged with normal voltage.

SAME—ACTION FOR DAMAGES—NEGLIGENT CONSTRUCTION—EVIDENCE—STATUTES. Compliance with Rem. 1915 Code, § 4976-1, prescribing certain rules for the construction of electrical lines, is not evidence of proper construction except in the particulars covered by the statute; and does not cover the necessity of using lightning arresters over transformers on poles carrying high voltage wires so as to prevent excessive current entering premises on distribution lines in case of a stroke of lightning.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 16, 1915, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through contact with an electric current. Reversed.

Robertson & Müller and Rosenhaupt & Grant, for appellants.

Post, Russell, Carey & Higgins, for respondent.

ELLIS, J.—Action for personal injuries. Defendant operates an extensive electric power system in eastern Washington and southern Idaho. It has a number of generating plants. One of these, a water power plant, is located on the Spokane river at Post Falls, Idaho. These generating plants are all tied into one system by means of high power transmission lines which are controlled from a substation in the city of Spokane, known as the Twenty-ninth avenue substation. The Post Falls plant is connected with the general system by two high tension transmission lines running by different routes from Post Falls to the Twenty-ninth avenue substation. One of these lines passes through Otis Orchards, a community about sixteen miles easterly from Spokane. This line normally carries from 60,000 to 64,000 volts. It consists of three wires. The poles carrying these wires in the vicinity of Otis Orchards are set along the south side of a highway known as the Trent road, which runs in an easterly and westerly direction. One of the high tension wires

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is strung on the extreme top of the poles, the other two near either end of a cross arm attached to the pole a few feet below the top. These wires are at regular intervals transposed so that what is the top wire at one point is the north or south cross arm wire at another point. These high tension wires are uninsulated large aluminum wires, and are protected from contact with the poles and cross arms by large insulators at the points where they are strung.

This pole line also carries another power line running from Post Falls to a point some distance west of Otis Orchards but not as far as Spokane. This second line also consists of three wires which normally carry approximately 6,900 volts. These wires are strung on a second cross arm about five feet below the cross arm carrying the two high tension wires. The 6,900 volt wires constitute a distribution line, that is, they carry power intended for distribution to consumers along the route, among them the consumers at Otis Orchards. Two of these distribution wires are attached to that part of the cross arm extending southerly from the pole. The third is attached to the opposite or northerly end of the cross arm. The service wires, which must not be confused with the distribution wires, lead from the distribution wires on the poles to the premises of each individual consumer. Normally there is no connection between the high tension 60,000 volt line and the 6,900 volt distribution line. The high tension line is used exclusively to transmit current from the Post Falls plant to the Twenty-ninth avenue substation. All the power used by consumers along the route is transmitted over the 6,900 volt distribution line. The power is delivered to each individual consumer from this line through a transformer placed on the pole in front of his premises immediately beneath the cross arm carrying the distribution wires. By the transformer, the current of 6,900 volts is stepped down to 110 or 220 volts before it is passed onto the service wires. The side of the transformer into which the 6,900 volt current is received from the distribution wires is

called the primary side and the other the secondary side. On each side of the transformer is a fuse box containing the fuse, which is a section of wire made of lead or other soft metal which will melt in case of an excessive charge of electricity, thus automatically severing the connection between the primary side of the transformer and the distribution wire, the fuse box on the other side being intended to perform the same office of severing the connection between the transformer and the service wire, in case an excessive current should find its way through the transformer.

On the pole immediately in front of the plaintiffs' house, there were two ground wires. One of these extended from the secondary side of the transformer down the pole into the ground. The other extended from the ground to the top of the pole and had branches extending horizontally along the upper side of the uppermost cross arm, that is, the cross arm carrying the two 60,000 volt wires. The function of the first is to conduct into the ground any excess current that might pass through the transformer to the secondary side, that of the second to ground any current that might escape from the high tension wires.

Plaintiffs live at Otis Orchards on the south side of the highway and receive power from the defendant with which to light their dwelling. On plaintiffs' premises are located two dwellings. The larger is occupied by plaintiffs and their family, the smaller by the family of plaintiffs' married son. The two buildings are about eighteen or twenty feet apart. Both are furnished with light by the same service wires which pass from the transformer to plaintiffs' dwelling and thence to that of their son. There was evidence indicating that only the two distribution wires strung on the south end of the lower cross arm entered the transformer and furnished the power for the lighting of these two buildings, and that the wire strung on the end of the lower cross arm north of the pole had no connection with the transformer.

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Between eleven o'clock a. m. and noon on June 27, 1914, there was a severe electrical storm accompanied with rain and hail in the vicinity of Otis Orchards. Lightning struck defendant's high tension transmission line a short distance to the west of the pole immediately in front of plaintiffs' premises. Some of the witnesses testified that they saw a ball of flame or fire traveling along the upper wire until it reached this pole, when it passed down the pole to the ground. Afterwards it was discovered that the insulator on the top of this pole was shattered and the top wire which it bore was thrown down so that it lay across the top cross arm about two feet from the pole. This same wire (which about one-half a mile to the west of the plaintiffs' residence was transposed to the north end of the cross arm so that at that point it was the north transmission wire), was broken a little less than two feet from the cross arm of the pole at that point, that end of the broken wire projecting into the air. The other end had fallen to the ground and was hanging from the cross-arm of the next pole to the west, the end lying on the ground a little to the north of the pole line and passing about eight inches or a foot north of the north distribution wire on the lower cross arm. The fuse box on the primary side of the transformer on the pole in front of plaintiffs' premises was shattered by the lightning and the fuse melted. The transformer was subsequently tested and found to be in perfect working condition.

At the time of the storm, plaintiff Wilhelmina Haas and her daughter were at work in the kitchen of plaintiffs' house. They were on either side of a table over the middle of which was suspended from the ceiling an electric light. It seems to be conceded that a charge of lightning entered the house and shocked the daughter, throwing her to the floor and rendering her unconscious for a short time. When she recovered consciousness, she discovered fire in the basement of her brother's house. She and her mother at once went into the other house and extinguished the fire. When the fire was

discovered, plaintiffs' daughter-in-law started towards a clubhouse about a quarter of a mile to the west where her husband was employed, to give an alarm. Plaintiffs' son and several fellow workmen, together with others, hastened to the scene of the fire, but by the time they reached it the fire had been extinguished. Immediately after the fire, it was found that the electric light wires in the basement were disarranged and burned off and that the electric light bulb was demolished. The burned wires were the wires of a switch which was placed on the door jamb of the cellar door. The ends of these switch wires were either hanging in the door or a short distance within the cellar. When the men came from the club house and its vicinity, plaintiff Mrs. Haas and a young man named Morgenthaler, with several of the men, went into the basement to see that the fire was wholly out. Some of the men had passed out, but Mrs. Haas, Morgenthaler and another man were in the act of passing out when Mrs. Haas, in passing under one of the wires which had been burned off, received a shock which severely burned her about the face, head and soles of her feet. At the same time Morgenthaler, who was standing about four feet from the wire but was uncertain whether he was touching Mrs. Haas or not, received a shock which threw him to the cellar floor and rendered him unconscious for a short time. One of the witnesses testified that, hearing the flash, he looked in the direction of Mrs. Haas and saw a flame passing from the ends of the wires directly into her face. From the evidence, it seems to be fairly established that this occurred about ten or fifteen minutes after the defendant's power line was struck by lightning and after the shock received by plaintiffs' daughter in the other house.

It appears that the switchboard in defendant's substation at Twenty-ninth avenue in Spokane is equipped with oil switches so arranged that in case of any interruption of the circuit on the transmission wires the switch will be thrown, thus automatically disconnecting the transmission line and shutting off the current. In the power house at Post Falls

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it does not appear that there were any of these automatic oil switches, but it does appear that an interruption or trouble on the line was detectable by a noise in the machine. It was shown from the records kept at the substation in Spokane that the oil switch tripped out on the 27th day of June, 1914, at 11:37 a. m. The Post Falls station operator testified that, at 11:37 a. m., he detected trouble on the high power transmission line through the noise in the machine. His testimony was as follows:

"Q. Now, to get it down into language that we can all understand, tell me what this means; what did you do? A. When the trouble came on? Q. Yes; first, when did you observe any trouble on the high power transmission line? A. Why, I noticed that on the machines. Q. When was it? A. At the time stated, and I opened the switch. Q. When was that? A. 11:37 a. m. Q. That is when the trouble was shown on the high power transmission line? A. Yes, sir. Q. What happened then? What happened to the switch? A. How do you mean? Q. Well, was it closed or open or did anything else happen to it? A. Well, it was closed, and I opened it. Q. Now, opening the switch, what does that mean? A. Well, that breaks the circuit. Q. The circuit is broken? A. Yes, sir. Q. What had you observed before the switch was opened at 11:37? A. The noise in the machine; that was the first time there was trouble on the line. Then I could hear the spring of the meters, and saw there was trouble on that line, so I opened that line immediately. Q. And then what did you do? A. I reported to the system operator. Q. What did you do with that line after that? A. After I opened it? Q. Yes, after you opened it? A. I reported it to the system operator, that there was trouble on it, and waited for orders. Q. Then what did you do at Post Falls; that is what I want to know? A. Well, I changed over the generators so I could get one generator on one bus, and get ready to try it out, and when I got orders to try it out I cut her in on the generator at half voltage. Q. Half voltage? A. Between sixty and seventy; it was about 120 on our machines. Q. You mean you didn't take all of it? A. No. Q. You used sixty volts or something like that? A. Yes. Q. And you closed the switch

at 11:45 or something? A. Yes, sir. Q. And that threw the power on the line towards Otis Orchards? A. Yes, sir. Q. And then what happened after that; did the switch open up again? A. No, sir, I opened it. Q. Well, you opened it; how long was it closed? A. About two or three seconds. Q. And then you opened it? A. Yes, sir. Q. And after that you closed it again, or did it remain open while you were on duty? A. It remained open. Q. Until you went off duty? A. Yes, sir."

On cross-examination he testified as follows:

"Q. Now, you were told from Spokane to put 120,000 volts on the high power wires? A. 20,000. Q. 120,000 were you? A. I did not put on 120,000. Q. How much did you put on there? A. I would have to figure that out. I put on 60,000 volts from the machine. Q. Does that make more than 60,000 volts? A. No, sir. Q. You put on all you could put on? A. No, sir. Q. You put the maximum voltage on the wires? A. I put on less than half. Q. That is, you put on 30,000 volts? A. Less than half. Q. 27,000 volts? A. Somewhere near that. Q. Now, then, when you did that, you did that at 11:37? A. No, sir. Q. What time? A. 11:45."

In response to interrogatories filed by plaintiffs, defendant answered that some disorder on the line was detected between 11 a. m. and 1 p. m. on the date in question, and that the high power wires between the hours of 11 a. m. and 1 p. m. were charged with approximately 63,000 volts of electricity.

It is plaintiffs' claim that the injury was caused by this charging of the high power wires with electricity when one of the wires was broken. Defendant, on the other hand, claims that this could not be because of the interposition of the transformer and the fuses, which would have prevented an excessive current of electricity from flowing over the line to the service wires leading into the premises where the injury occurred. The charges of negligence, stated briefly as may be, are these: That with full knowledge or with means of knowledge that the high power wire was broken and in contact with the distribution wires, defendant negligently and

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without any attempt to ascertain where the break was, caused the broken wire to be connected with the generating machinery and caused it to be charged with a high voltage of electricity; that the transformer was out of repair, of which defendant had knowledge or means of knowledge, so that it did not protect the service wires leading to plaintiffs' premises from an overcharge of electricity; that defendant was further negligent in placing the distribution wires on the same poles with the high power wires and directly underneath them without being adequately insulated and without guards or other means of preventing the high power wires from falling on, over or against the distribution wires should the high power wires become broken or dislodged; that defendant was further negligent in failing to use an adequate and proper device known as a lightning arrester which, if properly installed, would have prevented any voltage greater than consistent with safety from entering the plaintiffs' premises. The first two of these allegations of negligence were found in paragraph 8 of the plaintiffs' amended complaint. The paragraphs of the plaintiffs' amended complaint were so misnumbered that no paragraph 7 appeared. Defendant, in its answer, denied the several allegations of negligence in the amended complaint by reference to paragraphs, and, it is claimed inadvertently, did not deny the allegations found in paragraph 8, but did deny the allegations of paragraph "7." The cause was tried to a jury, which returned a verdict in plaintiffs' favor for \$6,016. Defendant moved for judgment *non obstante veredicto*, and in the alternative, for a new trial. The motion for judgment *non obstante veredicto* was granted. The motion for a new trial was not passed upon. Plaintiffs appeal.

Appellants first contend that, inasmuch as the allegations of negligence contained in paragraph 8 of the amended complaint were not denied by the answer, they stand admitted, and that therefore they establish such admitted negligence on respondent's part as to make the granting of judgment

non obstante manifest error. We are convinced that respondent's denials in paragraph 5 of its answer, though specifying paragraph "7" of the complaint, were intended to be addressed to the allegations found in paragraph 8 of the amended complaint. The evidence shows that, throughout the trial, the allegations of negligence contained in paragraph 8 were treated by the court and counsel on both sides as denied, the main controversy on the facts being waged upon those allegations. The theory upon which the trial proceeded cannot be rejected for the first time in the appellate court. *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89; *Grant Brothers Construction Co. v. United States*, 232 U. S. 647, 661; *In re Lind's Estate*, 90 Wash. 10, 155 Pac. 159; *Driver v. Galland*, 59 Wash. 201, 109 Pac. 593; *Nielsen v. Northeastern Siberian Co.*, 40 Wash. 194, 82 Pac. 292; *Standard Furniture Co. v. Anderson*, 38 Wash. 582, 80 Pac. 813.

It is next contended that the court erred in refusing to grant judgment for appellants at the opening of the trial because of the failure of respondent to answer a certain interrogatory as follows: "State the exact time or times at which you turned on said current on said date between the hours of 11 a. m. and 1 p. m." Sometime prior to the trial, respondent had been ordered to answer the interrogatories, including this one, by the judge of another department of the superior court. When appellants moved for judgment, respondent's counsel objected to answering the interrogatory because it would show the exact time when the current was turned on, and thus enable appellants to shape their evidence so as to show that the accident occurred at that very time. The excuse is not a good one. The court would have just as much right to assume that, had appellants' evidence been first put in, the answer to the interrogatory would have been falsely framed to contradict the evidence, as it has to assume that, if the answer to the interrogatory were first put in, the appellants' evidence would be falsely framed to correspond

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with that answer. It cannot be assumed that either party would be more apt to give false testimony than the other, in the absence of some showing to that effect. The court committed no error in holding that this interrogatory should be answered at once. The answer was accordingly filed, stating that the current was turned on at 11:46 a. m. But it does not follow that, because there was no sufficient excuse for not answering the interrogatory, the court erred in permitting it to be answered at the opening of the trial, and in not granting judgment for failure sooner to answer it. The statute, Rem. 1915 Code, § 1230, makes the penalty for refusing to answer interrogatories the striking of the offending party's pleading and the rendition of judgment against him. But in this case no motion was made to strike respondent's answer, but only a motion for judgment. Since the penalty prescribed by the statute is a severe one, we do not think the courts should impose it except where the moving party brings himself within the terms of the statute. Moreover, the interrogatory was answered before any evidence was introduced, and it does not appear that the failure to answer it earlier could have had any prejudicial effect upon the presentation of appellants' case. We have been cited to no case in which the same circumstances as those here presented are found. While the question presented is a close one, we are loath to hold, in the absence of a showing of injury, that a judgment should be rendered against the offending party where, as in this case, the interrogatory was answered in time to meet its original purpose.

Upon the main issue, as to whether the court erred in granting judgment notwithstanding the verdict, it is not only impracticable but unnecessary to discuss the extremely voluminous evidence in detail. There was some evidence that, after the stroke of lighting which broke the wire and injured appellants' daughter, there was another violent flash of lightning which might have caused the injuries to Mrs. Haas. The evidence as to this second flash was vague, and other

witnesses testified that it was perfectly clear at the time of the injury and that there was no second flash of lightning. There was also much testimony of expert witnesses to the effect that the charge from respondent's power house could not have passed to the service wires on appellants' premises so as to cause the injuries, because the fuse leading to the transformer had already been destroyed and because the ground wires on the pole would have carried the charge into the ground. Other experts, however, denied such impossibility and expressed the view that, even though the broken wire at the end which was charged did not touch the distribution wires, the wet wooden cross arm upon which it rested might have acted as a conductor sufficient to carry an excessive charge of electricity over the small insulators of the distribution wires and thence onto the service wires and cause the injury. The trial court seemed to be of the opinion, and so are we, that this evidence was sufficient to take to the jury the question whether or not the injury was caused by the current turned on at 11:45 a. m. by the operator at Post Falls.

Whether in turning on this current there was negligent operation is a closer question. Every expert witness who testified upon the subject stated that respondent's appliances for detecting breaks or interruptions in the current on its high power transmission line were of the best and most approved type; that there is no apparatus known to science which, with a high power line such as that here involved, would do more than indicate trouble on the line, and that no apparatus would indicate the nature of the trouble. All of the witnesses were of the opinion that an indication of trouble on the switchboard, either in the Spokane substation or in the power house at Post Falls, would not mean that the trouble was serious or the line broken or in otherwise dangerous condition. Every witness who testified on the subject testified that, in the usual course of operation, the switches or other apparatus for indicating trouble show trouble of

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some kind frequently, one witness said many times each day. In many instances—one witness said fully sixty per cent—the switch when closed again shows no further trouble, and in such cases the cause of the trouble is never known. It is therefore evident that the most that the tripout of the oil switch in Spokane and the indication of trouble at Post Falls showed at the time in question was that there was some trouble on the line, but did not indicate to anybody the nature of the trouble or whether it was serious or not. Every expert witness who testified on the subject said that the universal method and the only practical method of procedure on an indication of trouble was to apply about one-half of the normal voltage of the line to the wire, and that if the connection is maintained it indicates that the trouble has disappeared and the line is clear; that if the current will not go through, the switches will again trip out, thus indicating that there is an absolute break in the line or some other serious trouble. The point of the trouble is then located by sectionalizing the line, trying out one section after another until the break or obstruction is located between two given points and the exact location is then discovered by patrolling the line between those two points.

All of the witnesses agreed that the only practical test is to put a current into the troubled line at about one-half the normal voltage and, if it shows trouble, again keep the power off the line until the trouble has been located, in the manner we have mentioned, and removed. There was much discussion with one of the expert witnesses as to the theoretical possibility of testing with a very low voltage a line which shows trouble. The witness answered, in substance, that this could be done with a line of low tension, but would be absolutely impracticable with a line normally carrying a voltage of 60,000 or over, as does the one here involved. This is apparently because the size of the wire would be such as to offer so little resistance to a current of low voltage as to indicate nothing reliable. The evidence makes it reasonably plain,

therefore, that there are but two certain ways in which to test a line showing trouble in order to determine whether or not there is a break, the one being the method which was employed here, the other being to patrol the line on each indication of trouble. Since trouble is shown many times a day and in a majority of cases the trouble is not only not serious but immediately disappears, it is manifest that patrolling the line to look for the trouble would be wholly incompatible with any practical operation of the line. As said by the trial court, it is clear that if respondent was required to patrol the whole line every time a switch opened the line could not be operated, since before one patrol was completed another obstruction would have appeared. It was upon this ground that the trial court granted the motion, namely, that respondent, having done the only practical thing that could be done to determine whether or not there was a break in the line, was not guilty of negligence in so doing. It will be noted, however, that the normal capacity of the line in question was a little over 60,000 volts; that the test, as testified to by the experts, was to turn onto the line when trouble was indicated about one-half the normal voltage. The only person who could testify as to what was actually turned on, namely, the station operator at Post Falls, contradicted himself as to the force of the current which he applied. He first testified positively that he turned on between 60,000 and 70,000 volts. On cross-examination he repeated this, but finally reduced it to about 27,000 volts. If, in fact, his first statement was correct, he was clearly guilty of negligent operation, since, under all the evidence, the proper test requires no more than one-half of the normal voltage, and, obviously, the greater the voltage the greater the danger.

We have often held, in common with other courts, that those who are furnishing electric power, because of the extremely dangerous character of that agency, are charged with the highest degree of care, especially in their relation

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with the public to whom they sell and distribute power. *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. 916; *White v. Reservation Elec. Co.*, 75 Wash. 189, 184 Pac. 807. The highest degree of care in such case is the highest degree of care compatible with practical operation. The conflict in the testimony of the Post Falls operator is further heightened by respondent's answer to the interrogatory that the line was charged with 63,000 volts at the time in question. It seems to us that the extreme doubt raised by respondent's own evidence as to the amount of current turned into this line to test it for trouble presented a question for the jury as to whether or not respondent was guilty of negligent operation. If the amount exceeded that required by the established tests, we cannot say, as a matter of law, that respondent was not guilty of negligence. Upon the evidence as presented, the question was for the jury.

In view of the fact that there may be another trial, we shall notice one other question. Appellants offered to show that, by the use of lightning arresters over the transformer, either lightning or excessive current from the disarranged high power wires above would have been so grounded as to prevent excessive current from entering appellants' premises. The court excluded this testimony on the ground that the question was one of statutory standard construction. We think this was error. While it is true that the act of 1913, Laws of 1913, ch. 130, p. 397 (Rem. 1915 Code, § 4976-1 *et seq.*), prescribes certain rules for the construction of electrical lines, that statute does not attempt to define every detail of construction, and we are inclined to hold that a compliance with the statute is not evidence of proper construction, except in those particulars covered by the statute.

Many pages of the briefs are devoted to a mooted application of the rule *res ipsa loquitur*, but we find it unnecessary to discuss that question, since the evidence, in any event, was sufficient to take to the jury the issue of negligence.

The judgment notwithstanding the verdict was improperly granted, but we cannot direct the entry of judgment on the verdict. The motion for a new trial remains undisposed of. In such a case, we have announced the rule that the cause should be remanded in order that the trial court may pass upon the latter motion. *Paich v. Northern Pac. R. Co.*, 88 Wash. 163, 152 Pac. 719.

The judgment is reversed, and the cause is remanded with direction to the trial court to pass upon the motion for a new trial and either grant a new trial or enter judgment on the verdict.

MORRIS, C. J., FULLERTON, CHADWICK, and MOUNT, JJ., concur.

[No. 13476. Department One. November 10, 1916.]

CHASE & BAKER COMPANY, *Appellant*, v. E. L. OLMSTED,
Respondent.¹

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—GIFTS—EVIDENCE—SUFFICIENCY. A finding that a player piano and music was the separate property of the wife is sustained by testimony of the wife that the same were gifts from her husband, who permitted her to treat it as her own, where there was no evidence to the contrary.

INSURANCE—FOR BENEFIT OF ANOTHER—PROCEEDS—OWNERSHIP—PAYMENT OF PREMIUM. Where a music house carried insurance for its own benefit and upon an instrument and music belonging to another left with it for sale, and the loss was adjusted and paid for the benefit of such owner, the proceeds apportioned to her by the adjustment belong to her, and it is immaterial that she did not know of the insurance or pay any part of the premiums.

TRUSTS—COMMINGLED FUNDS—DISSIPATION BY WITHDRAWALS—RIGHTS OF BENEFICIARY. Where a trustee blended the trust funds by depositing it in bank with his own, and checked against it indiscriminately, withdrawals leaving a balance of less than the trust funds are a dissipation of the fund, except as to the balance, and

¹Reported in 160 Pac. 952.

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the *cestui que trust*, garnisheeing the bank, is limited to the recovery of the lowest balance to which the blended account was reduced at any time.

SAME—COMMINGLED FUNDS—DISSIPATION—RIGHTS OF BENEFICIARY—GARNISHMENT—BURDEN OF PROOF. A *cestui que trust*, garnisheeing a bank on the blended account of the trustee which the trustee had reduced by withdrawals, has the burden to show the amount of the lowest balance of the blended account which fixes the amount of the recovery.

APPEAL—REVIEW—INVITED ERROR. In a garnishment of trust funds blended by the trustee by general deposit in a bank, objection to the bank's books, when offered to show the actual balance due, does not invite the error of the court in holding that the balance prior to the last deposit was immaterial and that the final balance, whatever its source, was charged with the trust to the full amount of the trust fund.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered September 14, 1915, upon findings in favor of the intervener, adjudging the right to money impounded in garnishment proceedings, tried to the court. Reversed.

Tolman & King, for appellant.

Hamblen & Gilbert, for respondent.

ELLIS, J.—This case presents a contest between plaintiff and intervener as to the right to certain moneys in bank impounded by writ of garnishment.

Plaintiff, Chase & Baker Company, brought an action against the Empire Music House to collect a debt of approximately \$600, summoning the Old National Bank as garnishee. The writ was served July 6, 1915. The bank answered, admitting a debt to the music house in the sum of \$551.07 at that time. Thereafter Mrs. E. L. Olmsted intervened, claiming \$525 of this money as the proceeds of insurance which had been carried upon a certain piano player and music which she had left with the music house for sale or exchange and which had been destroyed by fire. The evidence showed that, in the summer of 1914, intervener deliv-

ered to the music house for sale or exchange a player and music, which she testified were gifts from her husband. In the spring of 1915, a fire destroyed this player and music, together with other musical instruments and property which belonged to defendant. The defendant, music house, carried three policies of insurance in different companies covering its own and intervener's property. The insurance adjusters fixed the loss on the player at \$500 and on the music at \$25. The total loss upon all the property, exclusive of fixtures, was adjusted at \$2,296.28, which amount was apportioned ratably between the three insurance companies. Pursuant to this adjustment, the Fidelity Phoenix Insurance Company of New York paid \$765.46 on June 18, 1915; the London Assurance Company of London paid \$1,020.61 on June 21; and the St. Paul Fire & Marine Insurance Company paid \$510.21 on July 1. These sums were deposited by the music house in its own checking account in the Old National Bank on the dates of their respective payment. Of these payments, \$175 of the first, \$233.63 of the second, and \$116.37 of the third were paid on account of intervener's player and music. The manager of the music house testified that he informed the insurance adjuster of intervener's ownership of the player and music and that the adjustment was made according to its proportion of the entire insurance. In this he was corroborated by the adjuster. On cross-examination, the manager testified that the music house checked against these deposits indiscriminately and that its check book showed that, on June 30, 1915, some days after the deposits of all the money save the last payment, the account of the music house had been checked down to 44 cents, but that he had no means of telling what checks had been presented for payment or how much money was actually in the bank standing to the credit of that account on June 30. Intervener then asked permission to show from the individual ledger of the bank the actual balance that then stood to the credit of the music house. Plaintiff's counsel at first assented to this, but after-

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wards objected on the ground that it was immaterial what was in the bank if checks had been issued against the account and were subsequently paid. The court sustained the latter view, stating that in this proceeding it was immaterial what checks were paid. Intervener thereupon rested and plaintiff offered no testimony.

The court, evidently entertaining the view that the state of the account at any time throughout its currency was immaterial and that the balance remaining at the time of service of the writ of garnishment should be charged with the whole amount of the insurance paid on account of intervener's instrument and music, made no findings as to the dates when the several payments were deposited and no findings as to the state of the account at any time during its currency. The court merely found that, of the sums paid and deposited on account of the insurance, \$525 had been paid on account of the loss sustained by the intervener, and that, at the time of the service of the writ, there remained in the bank \$551.07 to the credit of the music house which had been paid by the bank into the registry of the court, concluding, as a matter of law, that of this sum \$525 were held by defendant in trust for the intervener. The court adjudged that, of this money deposited with the clerk of the court, intervener was the owner of \$525, and ordered that the clerk pay to intervener that sum and costs. Plaintiff appeals.

Appellant contends, (1) that the evidence was insufficient to show that intervener was the owner of the player and music; (2) that, in any event, intervener failed to show any title to the money on deposit in the bank at the time of the service of the writ of garnishment.

As sustaining the first contention, it is argued that, inasmuch as the player and music were acquired during the marriage relation of intervener and her husband, the property was community property and not her separate property. Intervener, however, testified that the player and music were gifts from her husband. There was no evidence to the con-

trary. It is evident that the husband had permitted intervenor to treat this property as her own. He at least would be estopped to claim any interest in it. We are satisfied that the evidence was sufficient to sustain the court's finding that the player and music were the separate property of intervenor. Moreover, so far as the record shows, the question of defect of parties was not raised at the trial.

It is next urged that the intervenor had no right to any part of the insurance money because she paid no part of the insurance premiums. But the evidence shows that the insurance was carried upon her instrument for her benefit and that the loss was adjusted and paid with that understanding. The fact that she did not know until after the loss that the property was insured and that she did not pay any part of the premiums is wholly immaterial to appellant's rights in the premises.

Appellant's main contention is that, inasmuch as the money paid on account of the loss of intervenor's property was commingled with moneys belonging to the music house and deposited in its checking account, the burden was upon intervenor to show, in order to a recovery of the full amount, that the blended account had never fallen during its currency below the amount paid on account of her loss. It is not disputed that, as a matter of law, the \$525 was a trust fund held by the music house for intervenor and commingled with its own funds. The right of a beneficiary to reclaim a trust fund is based upon his right of property, not upon any right as a preferred creditor of the trustee. Hence, it was formerly held that the blending of trust money with that of the trustee defeated the owner's title and reduced his status to that of an unsecured creditor of the trustee. This on the theory that, having lost its identity, the trust money could not be followed and recovered *in specie*. The inequitable results of this doctrine finally led a great majority of the courts to adopt the rule that, where money held by one person as trustee for another has been commingled with money of the

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trustee and deposited in a bank to the trustee's individual credit, the balance in the bank may be charged with the trust. This on the reasonable presumption that the trustee intends to use only what he has the right to use, and that whatever the trustee withdraws from the account is from his own part of the common fund and that the balance remaining includes the trust fund. *Board of Com'rs of Crawford County v. Strawn*, 157 Fed. 49, 15 L. R. A. (N. S.) 1100; *Waddell v. Waddell*, 36 Utah 435, 104 Pac. 743; *Widman v. Kellogg*, 22 N. D. 396, 133 N. W. 1020, 39 L. R. A. (N. S.) 563; *Lincoln Savings Bank & S. D. Co. v. Morrison*, 64 Neb. 822, 90 N. W. 905, 57 L. R. A. 885; *Smith v. Fuller*, 86 Ohio St. 57, 99 N. E. 214, Ann. Cas. 1913 D. 387; *Brennan v. Tillinghast*, 201 Fed. 609; *Southern Cotton Oil Co. v. Elliott*, 218 Fed. 567; *Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332, 137 Am. St. 448; *Spokane County v. First Nat. Bank*, 68 Fed. 979.

But as a resulting corollary it is still held that, if at any time during the currency of the blended account the withdrawals leave a balance less than the trust fund, that fund must be regarded as dissipated, except as to such balance. Sums subsequently added to the account from other sources cannot be attributed to the trust fund. *Board of Com'rs of Crawford County v. Strawn*, *supra*; *Hewitt v. Hayes*, *supra*. Some courts have refused to recognize this corollary but they are few, and at least one of these has, in more recent decisions, receded from its former position. *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. 383; *In re Plankinton Bank*, 87 Wis. 378, 58 N. W. 784; *Burnham v. Barth*, 89 Wis. 362, 68 N. W. 96. For a full statement of the foregoing principles substantially in the language of the leading cases see 3 R. C. L. § 180. As between other creditors and the *cestui que trust*, the burden of proving his title still rests upon the latter. *Schuyler v. Littlefield*, 232 U. S. 707. Aided by every presumption, he can only recover the lowest balance to which the blended account had been reduced pending its cur-

rency as shown by the bank's books. *Powell v. Missouri & A. Land & Min. Co.*, 99 Ark. 553, 139 S. W. 299.

Applying these principles to the case before us, it is clear that the judgment must be reversed. Prior to the last deposit of July 1, 1915, of \$510.21, there had been deposited and commingled with money of the music house \$408.63 of intervener's money. The evidence is undisputed that, prior to this last deposit, the music house had checked against this account, but there is no evidence as to what checks had been paid or what was the lowest ebb of the account prior to the last deposit. The burden was upon intervener to show this, since no part of the last deposit save \$116.37 paid on account of the loss of her property can be attributed to the trust fund. Counsel for intervener offered to show the actual state of the account by the bank's books. The court held that this was immaterial. This was error. It may be asserted that the error was invited by counsel for appellant through his objection to this offer. And this is true, but it is manifest that the court's ruling was at least calculated to lead appellant's counsel to believe that the check book of the music house was the only competent evidence of the state of the blended account. The error invited by appellant was not the error committed by the court and carried into its findings. The court's error went deeper. It consisted in the evident assumption that the actual state of the blended account during its currency prior to the last deposit was immaterial and that the final balance, whatever its source, was charged, as a matter of law, with the trust to the full amount of the trust fund. Appellant's error was as to the character of the evidence competent to establish the condition of the account during its currency. It would be unfair to hold appellant estopped to question the judgment for that reason, since, even had the intervener been permitted to prove the condition of the account from the bank's books, the court's findings show that the judgment would have been the same as that rendered.

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Of the moneys in court, intervener is entitled to \$116.37, the trust money contained in the last deposit, plus the lowest balance to which the blended account had been reduced subsequent to the first deposit of June 18, and prior to the last deposit of July 1, but in no event the total to exceed the sum of \$525 and her costs. Since she was compelled to go into court to recover any part of the trust fund, it is clear that, in addition to whatever she is permitted to recover of that fund, she is entitled as against plaintiff, a mere general creditor, to have her costs paid from the money in court. The case is here for trial *de novo*, but the evidence essential to its proper determination is not before us and was not before the trial court.

The judgment is reversed, and the cause is remanded with direction to take further evidence as to the condition of the blended account at all times between June 18 and July 1, 1915, make an additional finding thereon, and enter judgment for intervener in accordance with this opinion.

MORRIS, C. J., and FULLERTON, J., concur.

[No. 13285. Department One. November 13, 1916.]

SAM SUNEL, *Appellant*, v. A. ARTHUR RIGGS, *Respondent*.¹

SALES—CONDITIONAL SALES—"SIGNED"—RECORDING. An order for the purchase of a safe, addressed to the vendor, signed by both parties, with the condition that the title shall not pass until the safe is fully paid for, recorded as a conditional sales contract, is good as between the parties.

SAME—CONDITIONAL SALES—"CREDITORS"—ASSIGNEE. Under Rem. & Bal. Code, § 3670, providing that unconditional sales contracts shall be absolute as to subsequent creditors in good faith unless the contract is filed, means those creditors who have acquired some form of lien on the property; hence does not apply to an assignee for the benefit of unsecured subsequent general creditors.

SAME—CONDITIONAL SALES—RETAKEING POSSESSION. Where a conditional sales contract is valid as between the parties, the seller, on default in payments, may retake the property at any time.

SAME—CONDITIONAL SALES—BONA FIDE PURCHASER. An assignee for the benefit of creditors who was informed of a conditional sales contract, valid as between the parties, is not a *bona fide* purchaser.

SAME. In such case the purchaser from the assignee is not a *bona fide* purchaser, when the safe was not in the assignee's possession but had been retaken by the seller.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered June 1, 1915, upon findings in favor of the defendant, in an action of replevin, tried to the court. Affirmed.

Will J. Griswold, for appellant.

Brown, Peringer & Thomas, for respondent.

MOUNT, J.—On March 10, 1913, one K. S. Mueller purchased from the defendant one Diebold safe upon a conditional sale contract providing that the title to the safe remain in the vendor until it was fully paid for, and that payments should be made at the rate of \$20 per month. This conditional sale contract was not recorded. After Mr. Mueller had possession of the safe for about a year, and had

¹Reported in 160 Pac. 950.

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not paid for the same, on April 23, 1914, he executed and delivered to Mr. Riggs another conditional sale contract for \$476, that being the purchase price of the safe. The sum of \$201.25 had been paid thereon, and the balance was to be paid in monthly installments of \$20, on the 4th day of each month. This contract was filed for record by Mr. Riggs on April 25, 1914. Thereafter, on January 26, 1915, Mr. Mueller made an assignment of his stock of goods to Nelson W. Parker for the benefit of creditors. At the time of this assignment, Mr. Parker was informed that the safe was held under a conditional sale contract, and that there was \$160 due thereon. The stock of goods was left by Mr. Parker in the possession of Mr. Mueller. When Mr. Riggs heard of this assignment, he took possession of the safe and removed it from the store of Mr. Mueller. Mr. Mueller made no objection, but counsel for Mr. Parker objected to the removal of the safe. Thereafter Mr. Parker sold the stock of goods, and Mr. Sunel, the plaintiff in this action, became the purchaser. The safe was not in the possession of the assignee at the time of the sale. Afterwards this action was brought by Mr. Parker to recover the safe, and Mr. Sunel was substituted as plaintiff in his stead.

At the trial of the case, upon these facts, the court concluded that the conditional sale contract was a valid contract between Mr. Mueller and Mr. Riggs; that the assignee, representing general creditors only, acquired no greater interest than Mr. Mueller had, and for that reason denied a recovery. The plaintiff has appealed from that judgment.

It is argued, first, that the conditional sale contract is not good between the parties because it was not properly signed by Mr. Mueller. Upon its face the conditional sale contract is an order addressed to Mr. Riggs by Mr. Mueller for the purchase of the safe, with the condition that the title to the safe shall not pass until the safe is fully paid for, etc. This order was signed by Mr. Mueller, and also by Mr. Riggs, with his post office address. It was filed for record by Mr.

Riggs. It is plain, therefore, under the rule in *Jennings v. Swartz*, 82 Wash. 209, 144 Pac. 39, which is relied upon by the appellant, that the contract was good as between the parties.

The appellant next contends that, even if it was good as between the parties, the contract was not good as against the assignee. This point is controlled by the case of *Malmö v. Washington Rendering & Fertilizing Co.*, 79 Wash. 534, 140 Pac. 569, and reaffirmed in this court on rehearing in *Eilers Music House v. Ritner*, 88 Wash. 218, 152 Pac. 1008, 154 Pac. 787. In the latter case, after referring to the rule in the *Malmö* case, and the department ruling in the *Ritner* case, we said:

"While we are not in harmony as to which rule is the better, were the question a new and independent one, we are all of the opinion that, as the *Malmö* case announced a rule of property, and property rights have become fixed and determined thereunder, the doctrine of *stare decisis* demands it be followed, except as otherwise determined by the act of 1915 [Laws 1915, p. 276, ch. 95]."

That is determinative of the same question in this case.

The appellant next argues that there was nothing due the defendant on the purchase price of the property at the time he took the safe away from the store of Mr. Mueller. The evidence is conclusive upon this question that there was \$160 due, and, of course, if the conditional sale contract was valid as between the parties to it, then under its terms he had a right to take the property away.

It is next contended that, when Mr. Riggs took the safe, he took it wrongfully. Whether the taking was wrongful or rightful depends upon the contract, which we have seen above was valid between the parties to it. Under its terms Mr. Riggs had a right to take possession of the safe if the contract was not complied with. He did so with the consent of Mr. Mueller, but over the objection of Mr. Parker. Mr. Parker, at the time he took the assignment, was informed of

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the conditional sale contract, and, of course, was not a *bona fide* purchaser. At the time the plaintiff in this action purchased from Mr. Parker, the safe was not in Mr. Parker's possession, and, of course, the plaintiff in this action cannot be said to be a *bona fide* purchaser without notice of the rights of Mr. Riggs.

We find no error in the record. The judgment is therefore affirmed.

MORRIS, C. J., CHADWICK, and ELLIS, JJ., concur.

[No. 13400. Department One. November 13, 1916.]

RUDOLPH GASCH *et al.*, *Respondents*, v. E. J. ROUNDS *et al.*,
Appellants.¹

APPEAL—REVIEW—PLEADINGS—AMENDMENTS. Where a defective answer was treated as raising an issue which was fully tried out on appeal the pleadings will be considered as sufficient to present the issue.

NEGLIGENCE—DANGEROUS PREMISES—LICENSEES OR INVITEES—EVIDENCE. Under the rule that an implied invitation to visit premises, as distinguished from mere license, requires mutuality of interest on the subject to which the visitor's business relates, plaintiff, injured by falling into an unguarded pit at night, is a mere licensee and not an invitee, where it appears that on request he was accompanying another to make a purchase, who, on entering the building, suggested that plaintiff wait outside because of the darkness, thereby removing the status of invitee on the part of the plaintiff, who had no business of his own on the premises.

SAME—CONTRIBUTORY NEGLIGENCE OF TRESPASSERS. In such a case, the plaintiff, in disregarding the suggestion and advancing in the darkness without a light or any caution, and plunging at right angles from a straight passage, is guilty of contributory negligence as a matter of law.

SAME—CARE REQUIRED AS TO TRESPASSERS. The owner of premises owes no duty to a mere licensee who fell into an unguarded pit at night, except not to wantonly or willfully injure him.

¹Reported in 160 Pac. 962.

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 14, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Reversed.

Preston & Thorgrimson and *Peters & Powell*, for appellants.

Wm. Brueggerhoff and *Peterson & Macbride*, for respondents.

ELLIS, J. — Action for personal injuries. Defendants Osgood and wife owned two lots abutting upon the north side of Third avenue in the town of Renton, with a frontage of sixty-five feet and running back to a depth of one hundred feet. Prior to the time here in question, there had stood on the front of these lots a frame building occupied by tenants of the Osgoods, among them one Hardy, a plumber, and one Kane, a dealer in electrical fixtures. At the time here in question, this building had been moved to the rear of the lots, Kane vacating and moving across the street, but Hardy still remaining as a tenant of the Osgoods and conducting his business therein. The Osgoods, through Rounds and wife, doing business as Rounds Construction Company, were erecting a two-story brick building about sixty-five feet square on the front of the lots. This building was divided into four storerooms of equal width, save the westerly one which had five feet cut off for a hallway running back to the rear of the building. The walls were up, the roof was on, the studding for the partitions was set, some of the partitions were lathed, and the floors were roughed in. No doors nor windows were hung and the fronts of the storerooms were not in. Some fifty feet back from the front was a wall running east and west, cutting off the rear of the storerooms and extending about eight inches into, but not crossing, the passageway along the westerly wall. Immediately off of this passage and immediately back of this rear wall of the westerly storeroom was a cement-lined furnace pit, ten feet square

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and eight feet deep. This pit was uncovered, unguarded and unlighted.

About eight o'clock on the evening of November 21, 1914, one McDonald, a man named Dorsey, and plaintiff, desiring to purchase certain electrical fixtures called "rosettes" for use in a house being built by McDonald, were directed to seek them from Kane at Hardy's plumbing shop at the rear of the new Osgood store building, where they supposed Kane still conducted his business. They first went north along Wells street, a cross-street about one-third of a block west of the new building, to an unenclosed private space leading back toward the frame building occupied by Hardy. They found this space partially blocked with lumber and piles of wood. In the darkness they despaired of finding the way through in safety and returned to the front of the new store building on Third avenue. They entered, plaintiff leading, went back through the westerly storeroom to its rear wall, and plaintiff passed round the end of this wall into the passageway. Seeing a light shining through the back of the building, he started toward it and fell into the pit. His companions coming up struck matches and, by their light, found him unconscious at the bottom of the pit. He sued to recover for his injuries, alleging Osgood's ownership of the premises, his contract with Rounds and wife, doing business as Rounds Construction Company, to erect the building, Hardy's occupancy of the old building in the rear as Osgood's tenant, Hardy's invitation to the public to pass through the new building to and trade at his store, with the knowledge and consent of the defendants, and negligence on the defendants' part in leaving the pit unlighted and unguarded. Defendants, by answer, admitted Hardy's occupancy of the building as Osgood's tenant, but denied the invitation to the public as follows:

"They deny that the said Frank H. Osgood, or Georgina Osgood, or Susie Rounds gave any consent to the use of the

building on the front part of the lot or its passageways, as access to the rear building."

They also set up contributory negligence as an affirmative defense, which was traversed by the reply.

The trial resulted in a verdict for \$800 in favor of plaintiff and against all the defendants. At appropriate times, defendants moved for a nonsuit and for a directed verdict. Both motions were denied. From a judgment entered on the verdict, all of the defendants appeal.

Appellants contend that respondent was not an invitee but a trespasser, or at best a mere licensee, to whom appellants owed no duty except not wilfully or wantonly to injure him. Respondent retorts that this issue was not presented by the pleadings, because in their answer appellants merely denied that either Osgood or his wife or Mrs. Rounds gave any consent to the use of the new building, or its passageways, as access to the rear building. It is true that these denials are in form a negative pregnant and, technically construed, amount to an admission that Rounds gave consent and that Hardy, with the knowledge and consent of all the appellants, held out the invitation. But at the trial it seems to have been assumed by the court and all of the parties that the pleadings were sufficient to present the issue of invitee or licensee. That issue was fully tried, hence we must treat it as an issue here. *Gaskill v. Northern Assurance Co.*, 73 Wash. 668, 192 Pac. 643.

Though unsatisfactory and in the sharpest conflict, the evidence was sufficient to take to the jury the primary question of an implied invitation to pass through the new building to the old one, to such persons as might desire to visit it for any purpose connected with the business there conducted by the tenant Hardy. On that primary question, the verdict is conclusive upon us. But it does not follow that respondent was such a person. Aside from the invitation to the public generally, implied from long acquiescence by the owner of private premises in the general public use of a way across

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his premises—a phase of the subject resting on an independent basis with which we are not here concerned—the rule of implied invitation may be stated as follows: Invitation as distinguished from mere license is implied by law only when the visitor comes for some purpose connected with the business in which the owner or occupant is there engaged or which he permits there to be carried on, and there must be some real or supposed mutuality of interest in the subject to which the visitor's business relates. This rule, which is sustained by almost universal authority, is thus stated in 3 Shearman & Redfield, Law of Negligence (6th ed.), § 706:

“Invitation by the owner or occupant is implied by law where the person going on the premises does so in the interest or for the benefit, real or supposed, of such owner or occupant, or in the matter of mutual interest, or in the usual course of business, or where the person injured is present in the performance of duty, official or otherwise.”

In an opinion reviewing many authorities, the supreme judicial court of Massachusetts states the rule as follows:

“It is well settled there that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must be at least some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant.” *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. 463.

See, also, *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Hart v. Cole*, 156 Mass. 475, 31 N. E. 644, 16 L. R. A. 557; *McCarvell v. Sawyer*, 173 Mass. 540, 54 N. E. 259, 73 Am. St. 318; *Dixon v. Swift*, 98 Me. 207, 56 Atl. 761; *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718; *Brehmer v. Lyman*, 71 Vt. 98, 42 Atl. 613; *Pauckner v. Wakem*, 231 Ill. 276, 83 N. E. 202, 14 L. R. A. (N. S.) 1118.

The test "of mutuality announced by the supreme court of Massachusetts seems to be the best that has been suggested." 3 Elliott, Railroads (2d ed.), § 1249. The rule, of course, does not apply to children of tender years. *Northwestern El. R. Co. v. O'Malley*, 107 Ill. App. 599. This court in a recent case has, in effect, sanctioned the rule as we have stated it, and has impliedly recognized mutuality of interest as its basis. *Kroeger v. Grays Harbor Construction Co.*, 83 Wash. 68, 145 Pac. 63.

Under this rule, was respondent here an invitee? We think not. True, he testified that McDonald had hired him to help wire McDonald's house and had asked him to help select the rosettes, that they first went to the Renton Hardware store and were there told "to go to Hardy who had them," and that he was not looking for Kane. But in every one of these particulars he was flatly contradicted by his own chief witness, McDonald. McDonald, though repeatedly pressed upon the subject, refused to testify that he had hired respondent for any purpose. He testified that he and his wife were paying a neighborly visit to respondent and his wife that evening; that he mentioned the fact that he was wiring his house and asked respondent to go with him to get the rosettes merely for company, and that Dorsey, who was there at the time, went for the same reason; that the clerk at the hardware store told him he could get the rosettes from Kane, who was "in with Hardy in the plumbing shop in the rear of the new building;" that he knew he was not going to get the materials from Hardy, but from Kane, and was looking for Kane at the time, and that he, McDonald, was going to select the rosettes. True, here is a conflict of evidence and, since no authority is cited to the contrary, we shall assume that a vital and positive contradiction by a party of a witness whom he introduces as worthy of belief raises such a conflict as to take the question to the jury; but there still remains the uncontroverted fact that respondent, before he entered the new building, was absolved from any duty to

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McDonald to enter it. McDonald testified that, when he found that they could not reach Hardy's store from the rear and had returned to the front of the new building, he suggested, because it was so dark, that respondent and Dorsey remain outside while he went through to the store; that, as the place was so dark, he thought it would be just as well if they would wait for him. This was not denied by respondent or any one else. Even assuming that McDonald actually had hired respondent and had been expecting to make his purchase from Hardy, and that he was actually looking for Hardy, not for Kane, still, when he told respondent to wait outside because of the darkness, he removed the only possible ground for a pretense on respondent's part to the status of an invitee. Respondent had no business of his own to transact at Hardy's store and, whatever his relation to McDonald, he no longer had any business of McDonald's at the store. Certain it is, from that time on, he merely went as company, just as McDonald testified he had done from the start. From the time he entered the building in disregard of McDonald's direction that he stay outside, he was technically a trespasser, or at best a mere licensee with no business there, either of his own or of another. He had no invitation. Even that of his alleged employer had been withdrawn.

It follows that the appellants owed him no duty except not wantonly or wilfully to injure him. He took the way as he found it, subject to its attending perils. When he advanced in the darkness, without a light and without any caution, as his own testimony shows he did, and blindly plunged at right angles from the straight passage, he was guilty of negligence which on all authority must be held, as a matter of law, the proximate cause of the injury. *McConkey v. Oregon R. & Nav. Co.*, 35 Wash. 55, 76 Pac. 526; *De Graffenried v. Wallace*, 2 Ind. Terr. 657, 53 S. W. 452; *Brugher v. Buchtenkirch*, 167 N. Y. 153, 60 N. E. 420; *Bentley & Gerwig v. Loverock*, 102 Ill. App. 166; *Bridger v. Gresham*, 111 Ga. 814, 35 S. E. 677; *Massey v. Seller*, 45 Ore. 267, 77 Pac.

397; *Blackstone v. Chelmsford Foundry Co.*, 170 Mass. 321, 49 N. E. 635; *Piper v. New York Cent. & H. R. R. Co.*, 156 N. Y. 224, 50 N. E. 851, 66 Am. St. 560, 41 L. R. A. 724.

The judgment is reversed, and the cause is remanded for dismissal.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ.,
concur.

[No. 13472. Department One. November 13, 1916.]

*In the Matter of the Estate of SARAH J. BROWN.*¹

EXECUTORS AND ADMINISTRATORS—CONTEST OF WILL—COSTS—RES JUDICATA. Where, on the contest of a will, the court, on application, refused to tax the costs of the appeal to the losing party, the judgment is conclusive of the matter, and the executrix cannot retry the matter on final accounting by asking that the costs be offset against the losing party's share of the estate.

Appeal from an order of the superior court for Spokane county, Blake, J., entered February 26, 1916, refusing to tax costs against the contestees of a will, upon approving the final account of an administratrix, after a hearing before the court. Affirmed.

Hamblen & Gilbert, for appellant.

W. D. Scott, for respondent.

FULLERTON, J.—On June 30, 1912, the respondents, by their guardian *ad litem*, instituted proceedings in the superior court of Spokane county to contest the will of Sarah J. Brown, deceased. The lower court sustained the validity of the will, and on appeal to this court, the judgment was affirmed. *In re Brown's Estate*, 83 Wash. 528, 145 Pac. 591. In the final judgment entered in the contest proceedings, the trial court refused to tax the fees and expenses of the appeal to the losing party. There was no cross-appeal on the part

¹Reported in 160 Pac. 945.

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of the defendants in the proceedings, and the question was not touched upon in the opinion of this court.

There were two persons named as executrices of the will. At the conclusion of the contest proceedings, one of the executrices filed a final account with the estate. In this account she sought to charge the contestants with the fees and expenses of the contest proceedings and to have the amount thereof set off against the share of the estate to which the contestants were entitled by the terms of the will. The trial court refused to charge the contestants with the fees and expenses, or to allow the offset. This is an appeal from the order of the court expressing its ruling.

It is our opinion that the court ruled correctly. Had a judgment been entered in the contest proceedings for costs in favor of the estate and against the contestants, undoubtedly the executrix could have set off the judgment against any distributive share of the estate awarded to the contestants. *Dray v. Bloch*, 29 Ore. 347, 45 Pac. 772. But no such judgment was entered therein. On the contrary, the court refused to assess the costs on application being made to it for that purpose. This was conclusive of the matter. The proper place to try out the question was in that proceeding, and since it was tried out there, and adjudicated against the estate, the executrix cannot have a retrial of the issue on the settlement of the final account.

The judgment is affirmed.

MORRIS, C. J., MOUNT, MAIN, and CHADWICK, JJ., concur.

[No. 13478. Department One. November 13, 1916.]

G. W. SHOWALTER, *Respondent*, v. JOHN F. SPANGLE *et al.*,
Appellants.¹

WITNESSES—COMPETENCY—TRANSACTION WITH PERSONS SINCE DECEASED. In an action to quiet title against two defendants, man and wife, claiming distinct properties through separate deeds of gift, as separate property, each of the defendants is entitled to testify on behalf of the other as to transactions had with the deceased, although disqualified in his or her own behalf, by Rem. 1915 Code, § 1211.

SAME. In such case, the interest of each spouse in the other's separate property is prospective only, and does not disqualify.

DEEDS—DELIVERY—INTENTION—EVIDENCE—SUFFICIENCY. The evidence is insufficient to show delivery of deeds of gift, in that no mutual intention presently to pass title was shown, where it appears that the grantor, in her last sickness, told her son that she was going to die, that in a box were two deeds, one for him and one for his wife, and requested that he take the box and "straighten up her affairs or her estate," giving no direction as to the deeds apart from the other contents of the box; and that the son had a key to the box.

DESCENT AND DISTRIBUTION—RIGHTS OF HEIRS—TITLE—STATUTES—ESTOPPEL. The failure of heirs to complain of the omission of real estate from the inventory, does not estop them from claiming an interest as heirs, in view of Rem. 1915 Code, § 1366, whereby real estate descends to the heirs immediately on the death of the ancestor.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 26, 1915, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Danson, Williams & Danson (George D. Lantz, of counsel), for appellants.

Davis & Heil, for respondent.

ELLIS, J.—Action to quiet title to real estate. The facts are as follows: Plaintiff is the son of Mrs. Sarah Jane Sho-

¹Reported in 160 Pac. 1042.

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walter. Mrs. Showalter and defendant Mrs. Mary Alma Spangle are sisters. They are the only heirs of George W. and Marcella E. Cook. About 1888, George W. Cook acquired title to two and one-half lots and Marcella E. Cook acquired title to another two and one-half lots in the town of Cheney, Washington. In 1888, through the medium of trustees, the property standing in his name was deeded to her, thus vesting in her the record title to all of the property. The Cooks resided upon the property the rest of their lives, he dying in 1901, she in 1912. No probate proceedings were ever had upon his estate. Her estate was probated, defendant John F. Spangle acting as administrator, but the real estate in issue was not listed as a part of the estate. On January 18, 1907, Mrs. Cook made a deed of two and one-half of the lots in question to defendant Mary Alma Spangle, and another deed of the other two and one-half lots to defendant John F. Spangle, but she did not then deliver either of these deeds. She kept them at all times in a tin box which she kept part of the time in a bank and part of the time at her home. These deeds were found in the box with about \$40 in money, certain promissory notes, and her other important papers, when it was opened after her death. She died August 6, 1912, at the Spangle home, where she had gone several weeks previously. The two deeds were placed of record by John F. Spangle on August 22, 1912, the same day of his appointment as administrator. On December 16, 1913, Sarah Jane Showalter executed a deed conveying to plaintiff an undivided one-half interest in the four lots and the two half lots in question, plaintiff thus acquiring whatever interest she had therein as an heir of George W. and Marcella E. Cook, her parents. He brought this action to quiet his title to this undivided one-half, further claiming in any event an undivided one-fourth through his mother as an heir of George W. Cook. Defendants answered, claiming title to the entire property by virtue of the above mentioned

deeds from Mrs. Cook. By reply plaintiff denied delivery of those deeds. John F. Spangle testified as follows:

"Well, this was some time two or three weeks I think after she [Mrs. Cook] was taken sick. I went into the bedroom—always went and talked to her—she says, 'Frank,' she says, 'I am not going to get well.' I says, 'Mother, you don't want to think about that.' . . . I told her then 'You don't want to think that way,' says I. 'You must remember you are old and cannot recover as quick as a younger person.' 'Well,' she says, 'I know I ain't going to get well,' she says. 'And I want you to straighten up my business.' And she told me the box, what the contents was, and she spoke about some insurance policies, and she says, 'There is a box in there with nearly forty dollars in,' she says. 'There is two deeds there, one for you and one for Mary; and all of the papers are in there.' And just then the nurse came and she quit talking about it. Q. And then what happened A. Well, there was nothing more said in regard to it at that time. Q. Where was the box at the time you had the talk with her and she said she wanted you to get the box? A. Right in the closet about six feet from the bed. Q. And did she deliver it to you? A. Yes, sir. Q. And from then did you have a key also to the box? A. Yes, sir. Q. And what did she say about the deeds to you and to Mary, if anything? A. Well, she said there was two deeds in there, one for me and one for Mary. Q. Tell you to take them? A. Yes, told me to take the box."

This was objected to on the ground that it related to a transaction with a deceased person and was inadmissible as against plaintiff, who claimed title through such person. Counsel for defendants then said, "Your honor cannot consider this testimony in favor of Mr. Spangle, but you can consider it in favor of Mrs. Spangle." The testimony was then admitted. On cross-examination he testified:

"A. She told me about the box, what was in the box, and her papers and about these deeds, and she told about the box containing nearly forty dollars. She says, 'My papers are all in there.' And just then the nurse came in and she quit talking about it at that time. Q. She said all of her papers were in there? A. I am not sure whether she said 'all of her papers.' Q. Did you find any of her papers anywhere except

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in this box? A. She has a little trunk. I don't think there were any papers to amount to anything. The main papers were right in this box. . . . Q. Now, if she had wanted you to return that box at any time before her death you would have returned it, would you not? A. If she would have called for it I certainly would. Q. Delivered it to her? A. Certainly. Q. Was there any one else in the room at the time that she delivered this box to you? A. No, not right at that time. The nurse came in just the time she told me to take the box. Q. Now, at the time she gave you the box she told you that she wanted you to take care of her affairs? A. She told me to take the box, that she wanted me to straighten up her affairs or her estate. Of course, I don't remember just how it was. Anyway she wanted me to settle up her business. . . ."

He did not take the box at that time, but did a few days later, as to which transaction, over the same objection, Mrs. Spangle was permitted to testify as follows:

"My mother asked Mr. Spangle if he had taken this box. Q. What did he say? A. He said no that he had not. Q. And then what was done and said? A. After he came in the door he asked me to get the box. Q. In her presence? A. In her presence. I got the box. I gave it to him. He took it and carried it to the postoffice then."

There was evidence that Mrs. Cook had told several other persons that she had made these deeds and intended that defendants should have the property. A brother of plaintiff testified that, in 1910, Mrs. Cook spoke to him of these deeds, said that she had fully determined that his father, whom she did not like, should never have the benefit of any of her property, but now that he was dead she had been "thinking it over a great deal," and, "I may change that yet."

The court found the facts substantially as we have stated them and, concluding that the deeds in question had never been delivered, entered judgment quieting title to an undivided one-half of the lots in plaintiff and awarded him his costs. Defendants appealed.

Two questions are presented: (1) Were all of these lots Mrs. Cook's separate property? (2) Was there a delivery of either of the deeds sufficient to pass title to either of the appellants? The conclusion which we have reached on the second question makes it unnecessary to discuss the first. We shall proceed at once to the question of delivery.

Respondent contends that there was no evidence of a delivery of either of the deeds, in that the testimony of neither appellant as to transactions which it is claimed constituted the delivery was admissible under the statute, Rem. 1915 Code, § 1211, because both of them were parties to the record and each testified touching a conversation or transaction had by the witness with the deceased, under whom respondent claims. Appellants concede that neither was competent to testify in his or her own behalf, but insist that each was competent to testify in behalf of the other. The latter view seems to us the sound one. The prohibition of the statute is against a party in interest or to the record testifying "in his own behalf." Appellants claim title to distinct properties through separate deeds of gift. They might have been sued separately, in which case unquestionably either would have been competent as a witness in behalf of the other, since the other's separate property alone would have been involved. *Foster v. Murphy*, 76 Neb. 576, 107 N. W. 843; *Hiskett v. Bozarth*, 75 Neb. 70, 105 N. W. 990; *Helsabeck v. Doub*, 167 N. C. 205, 83 S. E. 241. In states where the common law right of dower exists a wife, in such a case as this, cannot testify in behalf of her husband. *Ayres v. Short*, 142 Mich. 501, 105 N. W. 1115. But that is because her inchoate right of dower, unlike the husband's curtesy, is a present legal interest indefeasable by any act of the husband. *Wylie v. Charlton*, 43 Neb. 840, 62 N. W. 220.

In the case here, the interest of each spouse in the other's separate property was certainly no greater because of their being joined in the same action than if they had been sued separately. In neither case was it greater than that of a

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prospective heir, and we have held that, since the living have no heirs, the interest of the ancestor does not disqualify the heir apparent. *In re Sloan's Estate*, 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960.

Assuming, therefore, that each appellant was competent to testify on behalf of the other, but not on his or her own behalf, was the evidence sufficient to show a delivery of either deed? It is essential to the delivery of a deed that there be a giving by the grantor and a receiving by the grantee with a mutual intention to pass a present title from the one to the other. It may be made through the hands of an agent and it may be accepted through the hands of an agent, but there must be a mutual intention presently to pass the title. This mutual intention is the cardinal requisite. *Seibel v. Higham*, 216 Mo. 121, 115 S. W. 987, 129 Am. St. 502; *Peck v. Rees*, 7 Utah 467, 27 Pac. 581, 13 L. R. A. 714; *Weisinger v. Cock*, 67 Miss. 511, 7 South. 495, 19 Am. St. 320; *Shults v. Shults*, 159 Ill. 654, 43 N. E. 800, 50 Am. St. 188. This is as essential to a deed of gift as to any other. It is elementary that a deed cannot perform the functions of a will, hence cannot be effectually delivered after the grantor's death. When, however, the grantor delivers the deed to a third person in escrow to be held until the grantor's death and then delivered to the grantee, the grantor retaining no dominion or control over it, the delivery is valid and an immediate estate is vested in the grantee at the date of the delivery in escrow, subject to the grantor's life estate. *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756; *Loomis v. Loomis*, 178 Mich. 221, 144 N. W. 552; *Roepke v. Nutzmann*, 95 Neb. 589, 146 N. W. 939; *Huddleston v. Hardy*, 164 N. C. 210, 80 S. E. 158; *Dickson v. Müller*, 124 Minn. 346, 145 N. W. 112; *Criswell v. Criswell*, 138 Iowa 607, 116 N. W. 713; *Griswold v. Griswold*, 148 Ala. 239, 42 South. 554, 121 Am. St. 64; *Rodemeier v. Brown*, 169 Ill. 347, 48 N. E. 468, 61 Am. St. 176.

While it has often been broadly stated that the law makes stronger presumptions in favor of the delivery of a deed of

settlement upon children of the grantor, especially minor children, than in an ordinary case of bargain and sale, nevertheless, on all authority, the question is one of intention to be determined by the attending facts and circumstances. To constitute a delivery,

"It must clearly appear that it was the intention of the grantor that the deed should pass the title at the time, and that he should lose all control over it. A deed for an interest in land must take effect upon its execution and delivery, or not at all." *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007, 49 Am. St. 176.

"Nor is any particular form or ceremony necessary to constitute a sufficient delivery. It may be by acts or words, or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor and of the grantee that the deed shall at once become operative, to pass the title to the land conveyed, and that the grantor loses all control over it." *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212.

See, also, *Shults v. Shults*, *supra*. In every case there must be something from which it clearly appears that there was an intention to make the deed a presently operative conveyance vesting title in the grantee within the grantor's lifetime. *Atwood v. Atwood*, 15 Wash. 285, 46 Pac. 240; *Fain v. Smith*, 14 Ore. 82, 12 Pac. 365, 58 Am. Rep. 281.

So measured, it seems to us that the evidence was wholly insufficient to show a delivery of either of these deeds. We shall consider it first as to the deed in which the wife was named as grantee. Appellant husband, though permitted time and again to state what deceased said at the time of the alleged delivery, did not testify that she told him to deliver the deed to the wife either then or thereafter. True, he testified that she told him one deed was "for Mary." But he did not say that she told him to give it to Mary, or to hold it for Mary, or to record it for Mary, either then or after her death. There was no act or word from which a delivery in escrow can reasonably be inferred. She expressed

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the belief that she was going to die. She told him not only of the deeds, but also of the money and the other private papers in the box. The only request she made of him was that he take the box and "straighten up her affairs or her estate." She gave no direction as to the deeds apart from the other contents of the box. She merely described them as she did the money and the insurance policies and in a general way the other contents of the box. She did not authorize him to remove the deeds or anything else from the box, except for use in settling her estate. The very fact that she had held these deeds for years without any attempt to deliver them, and the further fact that, at this time, she gave the witness no direction as to what should be done with them, except the implication from her language that they, with the other contents of the box, should be used in settling her estate, seem to us capable of no other construction than that she believed that these deeds, though never delivered until after her death, could then take effect for the first time in the same manner as a testamentary disposition of the land. In this she was, of course, mistaken, but that cannot supply the place of delivery as an operative instrument during the life of the grantor. *Weisinger v. Cock, supra*.

The case of *Porter v. Woodhouse*, 59 Conn. 568, 22 Atl. 299, 21 Am. St. 131, 13 L. R. A. 64, presents a close parallel to this on the facts. An aged woman owned two houses, in one of which she lived. Several years before her death she made deeds of one of these to P., and of the other to R. On each deed was indorsed the name of the grantee. She placed them in a box in which she kept her will, her bank books, her insurance policies and other important papers, and in which she also had a bag containing \$1,000 in gold. The box was kept in a closet in her bedroom. During the last year of her life she told an attendant that she had deeded away the two houses. Having suffered an injury and being apprehensive of death, she told her attendant where the box was and said, "I put that box in your possession. My private papers are

in it and the bag of gold. My will is there and the deeds of the two houses. I told you that I had deeded away these houses. On the deeds are the names of the persons who are to have them." She then directed the attendant to take charge of the box, put it back in the closet, and told her where the key was, saying, "I have said enough so that you will know what to do with the box in case I should die. If I live I will talk further about the contents of the box, but do not open it until after my funeral." She died about a month later. Upon these facts the court, though recognizing the general rule that a delivery of a deed in escrow for delivery to the grantee after death is a valid present delivery, held that the facts stated showed no such intention. The superior court found that the sole purpose of the conversation with the attendant was to give her information of the existence and contents of the box. On appeal the supreme court said:

"The delivery of a deed includes not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee. As we are satisfied that Mrs. Hinman never did any act by which she parted with the possession of the deeds for the benefit of the grantees, the question of her intent becomes immaterial."

Appellants lay much stress upon the assumed delivery by deceased of the key of the box. That circumstance, however, in view of the declared purpose of the delivery of the box, is entitled to little force. Moreover, it will be noted that the witness, though testifying that he had a key, did not testify that deceased gave it to him. From the entire evidence, we are satisfied that the deed was never delivered, even in escrow, with the purpose of consummating the transaction so as to make it a presently operative conveyance.

As to the delivery of the deed in which appellant husband was named as grantee, since his testimony was inadmissible in his own behalf, it cannot aid or be aided by the wife's testimony. Her testimony to avail must be found sufficient

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standing alone to show a delivery. But in the transaction detailed in her testimony, the deed was not mentioned. She merely testified that the deceased asked the husband if he had taken the box; that he answered he had not; that he then asked the wife to get the box, and that she did so and gave it to him and he took it to the post office. This is all, and we think it wholly insufficient to prove any intention on the part of the deceased then to deliver the deed to him as a presently operative instrument. There was no evidence that the deceased then had the deed in mind or intended her question touching the box as a delivery of the deed. This evidence merely shows an intention to make him her custodian of the box and whatever it contained. Nor is any of the evidence as to the delivery of either deed aided by the fact that the box containing the deeds and the key to it were produced by the husband after Mrs. Cook's death. She died in the Spangle home. It was admitted that she had possession of the box and of the deeds while there. Naturally on her death they would be found in the possession of the appellants, whether delivered to either of them or not. The evidence was much more compatible with her regarding him as the custodian for her than with the idea that she intended to relinquish control or dominion over the box or any of its contents. *Chambers v. McCreery*, 106 Fed. 364; *Bean v. Bean*, 71 N. H. 538, 53 Atl. 907. Our own decisions, *Maxwell v. Harper*, 51 Wash. 351, 98 Pac. 756; *Matson v. Johnson*, 48 Wash. 256, 93 Pac. 324, 125 Am. St. 924; *Thatcher v. Capeca*, 75 Wash. 249, 134 Pac. 923, cited by appellants, are readily distinguishable from the case here on the facts.

We find no merit in the contention that respondent was precluded from a recovery in this case because of the fact that, with his mother's knowledge, this real estate was not included in the probate of Mrs. Cook's will. Respondent claims by right of his mother's heirship. The real estate descended to the heirs immediately on Mrs. Cook's death. Rem. 1915 Code, § 1366. Unless it was necessary to sell it to pay debts,

it was not essential that it be included in the probate proceedings. The failure to complain of the nonperformance of a useless thing can hardly work an estoppel.

The judgment is affirmed.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ.,
concur.

[No. 13490. Department Two. November 13, 1916.]

HERMAN F. KELLER, *Appellant*, v. F. E. DAVIS *et al.*,
Respondents.¹

TAXATION—TAX DEED—ACTIONS TO SET ASIDE—LIMITATION. An action to quiet title to land sold for taxes on the ground that the tax judgment was void for want of valid process, is governed by Rem. 1915 Code, § 162, limiting actions to cancel a tax deed or recover lands sold for taxes to three years from the date of the issuance of the tax deed.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered February 4, 1916, upon sustaining a demurrer to the complaint, dismissing an action to quiet title. Affirmed.

Louis A. Dyar, for appellant.

L. C. Jesseph, for respondents.

HOLCOMB, J.—Appellant began this action in June, 1915, to quiet title against a tax deed issued by the treasurer of Stevens county after judgment of foreclosure of certificate of delinquency on October 7, 1911.

Appellant averred that the judgment in foreclosure was utterly void for want of valid process, thus avoiding the treasurer's deed; that respondents have never been in possession of the land, which is wild and vacant; that appellant, after execution of the tax deed, paid all general taxes since

¹Reported in 160 Pac. 946.

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assessed against the land, thus retaining constructive possession of the land against the purchaser; and that tender of the amount paid for the certificate of delinquency, plus interest, had been refused by the purchasers of the tax deed. The court sustained a demurrer to appellant's amended complaint upon the ground that the action is barred by the statute of limitations of such actions, Rem. 1915 Code, § 162, which is as follows:

“Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed; Provided, this section shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of this act.”

This case is manifestly governed by the reasoning and the rule announced in the cases of: *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 116 Pac. 1082; *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522; *Savage v. Ash*, 86 Wash. 43, 149 Pac. 325.

The action is barred. The judgment of the superior court is affirmed.

MORRIS, C. J., MAIN, and PARKER, JJ., concur.

[No. 13550. Department Two. November 13, 1916.]

FRUITLAND IRRIGATION COMPANY, *Respondent*, v. GEORGE L.
THAYER *et al.*, *Appellants*.¹

WATERS AND WATER COURSES—IRRIGATION—CONTRACTS—RESERVATION OF LIEN—FORECLOSURE. A contract by an irrigation company to furnish water may, irrespective of statutory authorization, create a lien in the nature of a mortgage upon the water right granted to secure all sums that may be due under the contract; and, upon any default, the same is enforceable in an action in equity to foreclose the mortgage or discharge the lien by sale of the land and water right.

SAME—IRRIGATION—CONTRACT—ACTIONS—ENFORCEMENT OF LIEN—TENDER OF DEED. In such an action, it is unnecessary that the company tender a water deed before action, where it is alleged that it would be vain, the grantee was in default, and the foreclosure decree and sale protected the grantees, allowing them a year for redemption.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered January 18, 1916, in favor of the plaintiff, overruling a demurrer to the complaint, in an action to foreclose a mortgage, tried to the court. Affirmed.

Smith & Mack, for appellants.

Osee W. Noble, for respondent.

FULLERTON, J.—In December, 1909, the Fruitland Irrigation Company entered into a contract with George L. Thayer and wife whereby it agreed to sell them a perpetual right to the use of water from the company's canal for the purpose of irrigating 84.2 acres of land owned by the Thayers in Stevens county. The purchasers agreed to pay for such water right the sum of \$2,526, in installments of \$505.20 each, on the first day of May in the years 1910, 1911, 1912, 1913 and 1914, with interest at the rate of seven per cent from May 1, 1910, on all deferred payments. The contract also provided for the payment of an annual maintenance

¹Reported in 160 Pac. 1048.

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fee of three dollars per acre in advance on the first day of May of each year. Among the provisions of the contract, were the following:

"It is expressly understood and agreed that the purchase price of said water right and the annual maintenance fee shall be a charge and lien upon said land and the whole thereof, and in order to secure the payment thereof, the purchaser hereby mortgages said land with its appurtenances and said water right unto the company, and this mortgage may be enforced and foreclosed in any court of competent jurisdiction, according to the laws of the state of Washington; . . . and it is agreed that all overdue payments, either for the purchase price of said water right or for said maintenance fee, shall draw interest from the date of maturity thereof at the rate of eight per cent per annum.

"It is further agreed, that the company may, at its option, for default in any of the payments of the purchase price of said water right, or for default in the payment of any installment of principal or any interest payment at the time the same becomes due and payable, declare the whole amount agreed to be paid hereunder due and collectible, and may foreclose this mortgage and sell said premises with the appurtenances, including said water right, in the manner prescribed by law, and out of the money arising from said sale, after deducting the costs and expenses thereof, and such amount as the court shall adjudge reasonable attorney's fees, apply the balance to the payment of said amounts, rendering the overplus, if any, to the purchaser, and such foreclosure may be had with like proceedings, remedies and effect for default in the payment of said annual maintenance fee. . . . It is further understood and agreed that when the purchaser shall have made full payment of the purchase price for said water right, with interest as aforesaid, the company will execute and deliver to such purchaser a conveyance of the perpetual right to the use of said water upon said lands upon the terms and conditions herein contained. . . .

"Time and punctuality are material and of the essence of this contract."

The contract was regularly executed and acknowledged in accordance with the statutes governing conveyances of real property.

The Thayers made payments on May 10, 1910, October 4, 1911, and May 5, 1914, totaling \$1,577.02, leaving a balance due on the principal sum for the right and maintenance fee amounting to \$2,020.80. On the refusal to make any further payments, the Fruitland Irrigation Company began this action on July 3, 1914, to foreclose its lien upon the land covered by its contract and mortgage, making defendants George L. Thayer, the minor children of Mary E. Thayer, his wife, then deceased, and the Farmers & Mechanics Bank of Spokane, which held a mortgage on the land taken subsequent to the contract of the plaintiff.

The complaint alleged that plaintiff was an irrigation company engaged in the sale of water and water rights, and that, prior to the execution of the contract with the Thayers, it was the owner of one hundred and sixty cubic feet of water and had constructed its irrigation canals. It then set forth the contract and its breach substantially as before stated, and alleged its readiness and willingness to deliver a good and sufficient water deed, but that it had been informed by defendant George L. Thayer, "that they were financially unable to pay the amounts due, could not pay the same and could not carry out their part of said contract, and that a tender of a water deed as provided for in said contract would be a vain and useless act." The prayer was that the water contract in the form of a mortgage be decreed to have been executed for the purpose of securing such contract, and that such contract and mortgage be foreclosed in pursuance of law, and the property, together with the water right, be ordered sold by the sheriff; that plaintiff or any party to the suit may become a purchaser at such sale; that the defendants be barred and forever foreclosed of all right, lien, estate, claim, equity or interest in such premises; and that said mortgage and water right be decreed to be a first lien upon the premises.

The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of

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action. The demurrer was overruled, and defendants elected to stand upon their demurrer and refused to plead further. The court, after making findings of fact and conclusions of law, entered its judgment against George L. Thayer for the sum of \$2,663.70, being the amount of principal and interest due at date of the entry of the judgment; further adjudging the contract to be a mortgage and a valid lien upon the real property described, together with the water right appurtenant thereto, first and superior to the claims and liens of the defendants and each of them, decreeing that the same be foreclosed and the property sold in accordance with the practice in such cases, reserving, however, to the defendants George L. Thayer and the Farmers & Mechanics Bank, and each of them, the right to redeem the lands and water right within one year after date of the sheriff's sale. The defendants George L. Thayer and the Farmers & Mechanics Bank appeal from the decree.

The appellants, proceeding upon the theory that the action is one for specific performance, contend that the complaint is insufficient as against general demurrer because of its failure to allege a tender of a deed by respondent, and to keep good the tender by bringing the deed into court. They also contend that, if the action be intended as one for damages, the complaint is insufficient because the damages have not been alleged. It is sufficient to say that the complaint fairly discloses on its face that it is designed neither for specific performance nor for damages, but has been drawn on the theory that the contract between the parties is what it assumes to be, namely, a contract in the nature of a mortgage creating a lien upon the land and upon the water right of appellant Thayer for any sums that may be due from him to respondent under the contract. The complaint is sufficient for this purpose; it aptly sets forth the charge and lien on appellant's land expressly created by the terms of the contract, and alleges the amount due and owing from Thayer to

respondent; it prays for the foreclosure of such lien and for an order of sale of the property and water right and the application of the proceeds of sale to satisfy respondent's claim, attorney's fees and costs, and the payment of any balance over to the party found entitled thereto. That contracts of this character are legal is well settled.

"In a number of the western states it is provided by statute to the effect that the contract amount . . . to be paid to water companies by the consumers furnished with water shall be a first lien upon the land for the irrigation of which the water is furnished and delivered. But whether this right is provided for by statute or not, we take it that a corporation has the power to make such a contract with its consumers, and that the lien so provided for may be enforced. . . . But in order to create the lien on the land the language used in the contract must be definite and specific, and must be a direct declaration that such a lien is created by its terms. . . . The usual method of procedure for enforcing such contracts where the payment of the water rates is neglected or refused is by a foreclosure and sale of the lien." 3 Kinney, *Irrigation and Water Rights* (2d ed.), § 1522.

The only statute in this state on the subject is found in the provisions for the reclamation of arid lands under the Carey act. Rem. 1915 Code, § 6721. While this statute is limited in its scope to water rights under the Carey act and does not apply generally, it shows the legislative recognition of the right to create such liens and enforce them by foreclosure. But, irrespective of statutory authorization, it is the undoubted right of parties by contract to agree between themselves that the property of one shall be security to the other for any debt owing by the former. The contract here in controversy provides for the sale by respondent to appellant Thayer of a water right, and that to secure the deferred payments appellant "mortgages his land with its appurtenances and said water right" unto respondent, "and this mortgage may be enforced and foreclosed in any court of competent jurisdiction according to the laws of the state of Washing-

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ton." Even if it were conceded that the instrument lacked any of the essential elements of a mortgage, it certainly possesses all the elements of a lien created by contract on specific property, enforceable for any default in a court of equity. The decree of the court directed the sale of both the land and the water right which would pass title to the water right as against respondent, a party to the action, notwithstanding the respondent had never tendered, nor brought into court, a deed for such water right. Its contract provided for foreclosure and sale of such water right on the enforcement of its lien, and all title of respondent therein would necessarily pass to the purchaser at sheriff's sale. Appellant Thayer and all claiming under him were protected in the decree, which allowed a year for redemption of such lands and water right from the execution sale.

What we have said disposes of the other assignments of error made by the appellants, and renders their further discussion unnecessary. We find no error in the rulings of the trial court, and its decree is affirmed.

MORRIS, C. J., MOUNT, PARKER, and HOLCOMB, JJ.,
concur.

[No. 13028. Department Two. November 14, 1916.]

FIDELITY NATIONAL BANK OF SPOKANE, *Respondent*, v. E. H.
STANTON COMPANY *et al.*, *Appellants*, MILLARD S.
HOSEA *et al.*, *Defendants*.¹

BILLS AND NOTES—LIABILITY OF INDORSERS—PREVIOUS AGREEMENT—MODE OF PAYMENT—FRAUDS, STATUTE OF—EVIDENCE—PAROL TO VARY WRITING. Regular indorsers of a mortgage note, negotiable on its face, warrant the genuineness of the instrument, the title, the capacity of all prior parties to contract and that the instrument was valid and subsisting at the time, and in addition engage to pay on notice of dishonor; and, therefore, they cannot avail themselves of a prior agreement by an indorser to accept in payment a quitclaim deed of the mortgaged property; since (1) such agreement if existent, is superseded by the indorsement, and (2) the indorsement cannot be varied or altered by a contemporaneous oral agreement, void under the statute of frauds.

MORTGAGES—PAYMENT—AGREEMENT TO ACCEPT PROPERTY—CONTRACT BY SUBSEQUENT PURCHASERS. An agreement with purchasers of mortgaged property who had not assumed the debt to dismiss a foreclosure suit, in consideration of an agreement to quitclaim the land if delinquent interest was not paid within a certain time, is not an agreement to accept payment in land that would discharge the note as to the makers and indorsers; and being made with a stranger to the obligation does not imply such an agreement.

SAME. A quitclaim deed of mortgaged premises tendered to the holder of the note pursuant to an agreement with an indorser is not accepted by the holder so as to release indorsers and discharge the obligation, where the holder returned it stating it should be made in blank, the holder expecting to turn it over to the indorser under the belief that he would pay the note and accept the deed.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered January 5, 1915, upon findings in favor of the plaintiff, in an action on a promissory note and to foreclose a mortgage, tried to the court. Affirmed.

Danson, Williams & Danson and Post, Avery & Higgins (George D. Lantz, of counsel), for appellant Stanton Company.

¹Reported in 160 Pac. 960.

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Burcham & Blair, for appellant Zirngibl.*Hamblen & Gilbert*, for respondent.

FULLERTON, J.—On October 16, 1912, Hosea and wife made and delivered to the E. H. Stanton Company their promissory note wherein they agreed to pay E. H. Stanton Company \$25,000, with interest from date at the rate of 7 per cent per annum, payable semiannually. The note contained an accelerating clause to the effect that, if the interest was not paid when due, the principal and interest of the note should become due and payable at the option of the holder of the note. At the time of the execution of the note and as a part of the same transaction, Hosea and wife also executed to the payee of the note a mortgage upon real property situated in Spokane county, securing the note according to its tenor and effect. Subsequent to the execution of the note and mortgage, Hosea and wife conveyed the mortgaged property to James Hunter and C. S. Slawson subject to the mortgage. Certain installments of interest on the note were not paid, and on August 27, 1913, E. H. Stanton Company, its then holder, brought an action to recover thereon and to foreclose the mortgage. After the institution of the action, Hunter and Slawson, under the date of September 8, 1913, wrote to the E. H. Stanton Company making the following proposition:

“In consideration of your dismissing the foreclosure suit against lots six (6) and seven (7), block sixty-seven (67), school section, Spokane, Washington, and extending the payment of interest on the \$25,000 mortgage secured by the above described property to, on or before May 1, 1914, we agree to convey by quitclaim deed to you and relinquish all interest in the aforesaid property not later than May 1, 1914, provided the aforesaid interest is not fully paid by us before the aforesaid date to December 1, 1913.

“In consideration of the extension of payment of interest we further agree to pay the premiums on all insurance now covering the building on the above described property, and to pay all taxes for the year 1912.”

The company accepted the proposition through its attorney by the following writing:

"Your letter of September 8, 1913, addressed to E. H. Stanton Company was turned over to me by the E. H. Stanton Company for answer. Your proposition is hereby accepted and I will get the order of dismissal signed tomorrow."

The foreclosure action was thereupon dismissed.

Shortly thereafter E. H. Stanton Company sold the note and mortgage to one Isabel M. Gray, who in turn sold it to Joseph Zirngibl. However, the note was delivered and the mortgage assigned by the company directly to Zirngibl. Subsequently the note was sold and the mortgage assigned by Zirngibl to the plaintiff, Fidelity National Bank, the bank received the same on April 6, 1914, and the purchase was entered on their books as of the next day. On delivering the note to Zirngibl, E. H. Stanton Company regularly indorsed the same, and on delivery of the note to the bank, Zirngibl likewise regularly indorsed it. Hunter and Slawson did not pay the interest as they agreed to do in their communication to E. H. Stanton Company, but in lieu thereof made and executed and tendered to the bank their deed to the property. This deed the bank returned to them with the following note:

"We return herewith the deed which you sent to us, which should be made in blank. We do not want the deed made to us."

No deed in any other form was tendered. Thereafter the bank demanded payment of the note from the principal and from the indorsers, and on their refusal to pay, began the present action to recover thereon and to foreclose the mortgage.

The complaint was the ordinary complaint in an action to recover upon a promissory note and to foreclose a mortgage given to secure it. E. H. Stanton Company and Zirngibl answered separately. E. H. Stanton Company, after certain denials, set up affirmatively that Hunter and Slawson,

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as part consideration for the conveyance to them of the mortgaged property by Hosea and wife, assumed and agreed to pay the mortgage. It set up, also, the commencement of the foreclosure action, its subsequent dismissal because of the contract between itself and Hunter and Slawson, and averred that it was the understanding between them that the deed therein agreed to be delivered was to be in satisfaction of the note and mortgage sued upon, and that it agreed to take it in full satisfaction of such note and mortgage; averring further that the subsequent transfer of the note and mortgage were made with knowledge of such agreement, and with the understanding and agreement on the part of the several transferees that a conveyance of the land was to be received by such transferee in full satisfaction of the note and mortgage. Zirngibl's answer was to the same effect.

The evidence, as we read it, did not justify these averments in their entirety. There is no evidence that Hunter and Slawson had in any manner assumed the mortgage or had agreed to pay the note, nor was there any evidence, other than the inferences arising from the writings, that either E. H. Stanton Company or Zirngibl, or the present holder of the note, agreed to take the property in satisfaction of the debt. Zirngibl knew of the written agreement between E. H. Stanton Company and Hunter and Slawson when he purchased the note and took an assignment from that company, and the bank had the same knowledge when it purchased the instruments from Zirngibl.

It is the contention of the indorsers that these writings changed the tenor of the note as to the medium of payment, that is, the note was changed by the agreement from an obligation payable in money to an obligation payable in specific property, and the deduction is drawn therefrom that the indorsements were implied agreements that the note would be paid according to its tenor as thus modified, and hence the tender of a deed to the mortgaged property, in accordance with the modified agreement, satisfied the obligation.

We cannot think these contentions tenable. The indorsements were without qualification. They were new and independent contracts, embodying all of the terms of the instrument indorsed in itself. Daniel, Negotiable Instruments (6th ed.), § 669. By the terms of the negotiable instruments act, the indorsers severally warranted: (1) that the instrument was genuine and in all respects what it purported to be; (2) that he had good title to it; (3) that all prior parties had capacity to contract; (4) that the instrument was, at the time of the indorsement, valid and subsisting; and (5) in addition, engaged that, on due presentation, it would be accepted and paid according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be taken, he would pay the amount thereof to the holder, or to any subsequent indorser who might be compelled to pay it. The warranty was of the instrument as it appeared on its face, free from the burden of any condition either of them may have assented to prior to the indorsement not expressed thereon in writing. Knowledge, therefore, by one taking the instrument that the indorser had agreed to accept payment in something else than money would not relieve the indorser of his obligation, whatever may be the rule with reference to the other party to the agreement. The instrument being negotiable in form, the indorser without qualification is bound by his own contract; he cannot be heard to plead a prior contract made with another party to relieve himself from the one he subsequently made. In other words, his act of indorsement was equivalent to writing the conditions the law implies from an indorsement on the instrument above his signature, and cannot be varied or altered by showing a prior written or prior parol agreement, or by a contemporaneous parol agreement. The first, if existent, is superseded by the new agreement, and the second is void because of the statute of frauds.

But perhaps we need not go to this extent in the present instance. The agreement relied upon to relieve from the obligation assumed by the indorsement does not bear the con-

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struction the appellants put upon it. It is not an agreement to accept the property in payment of the obligation. The agreement was made with one not obligated to pay the debt, and the expressed consideration was a suspension of the time within which the holder of the mortgage would enforce the debt against the property. There was no express agreement to take the property in satisfaction of the debt, and since the contract was made with a stranger to the obligation, none will be implied.

Another contention is that the bank accepted the deed from Hunter and Slawson and by that act released the sureties. This is founded on the letter written by the bank when it returned the deed Hunter and Slawson had tendered. But it is distinctly stated therein that the bank did not wish the deed made to it. In explanation, the officer of the bank having the matter in charge testified that the bank wished the deed in blank so that it might be turned over to E. H. Stanton Company, the witness believing that the company would accept the deed and pay the note. But whatever the motive may have been, there was clearly no independent agreement on the part of the bank to accept the property in satisfaction of the debt.

The judgment is affirmed.

MORRIS, C. J., ELLIS, MOUNT, and CHADWICK, JJ., concur.

[No. 13347. Department One. November 14, 1916.]

LOTAN R. DOLBY, *Respondent*, v. LIBBIE DOLBY, *Appellant*.¹

DIVORCE—CUSTODY OF CHILDREN—MODIFICATION—SUIT MONEY—ALLOWANCE AFTER DECREE. Rem. 1915 Code, § 988, authorizing suit money pending an action for divorce, presupposes the existence of the marital relation; and after a divorce is granted, settling property rights and the custody of the child, the court cannot, upon the father's application for modification of the decree respecting the child's custody, require the payment of suit money and attorney's fees to aid the mother in her defense to the motion.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered December 22, 1915, denying a motion for an order requiring the payment of suit money and attorney's fees into court pending the hearing of a petition for the modification of a divorce decree. Affirmed.

Roche & Onstine and *George Gregory*, for appellant.

Losey & Newton, for respondent.

FULLERTON, J.—On February 13, 1909, the appellant, Libbie Dolby, procured an absolute divorce from respondent, Lotan R. Dolby. By the terms of the decree, the property rights of the parties were fixed and determined and the custody of their minor child awarded to the appellant, subject to the right of the respondent to visit the child at fixed periods.

A petition was subsequently filed by the respondent praying that the decree be modified to the extent that he be awarded the care and custody of the child in place of the appellant, alleging, among other things, that the appellant was not a fit and proper person to have the child in her possession. The appellant then moved the court for an order requiring the respondent to pay to the clerk of the court the sum of \$500 as suit money and attorney's fees so as to enable her to employ counsel and prepare her defense to the petition.

¹Reported in 160 Pac. 950.

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Opinion Per FULLERTON, J.

This appeal is taken from the order of the lower court overruling the motion.

As the respondent's contention is that the court had no legal authority to make such an order after the spouses had been divorced, this appeal presents but a single question of law, namely, is the existence of the marital relation a condition precedent to the power of the court to grant the wife attorney's fees. The appellant contends that the court has a right to allow attorney's fees in a proceeding of this character because it is not an independent action, but a continuation of the original divorce proceeding, and because the court has continuing jurisdiction over the custody of minor children. It is apparent, however, that this contention is immaterial if respondent's theory is correct. The statute provides (Rem. 1915 Code, § 988):

"Pending the action for divorce the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; and on decreeing or refusing to decree a divorce, the court may, in its discretion, require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce has been granted or refused, and give judgment therefor."

It is evident that this statute presupposes the existence of the marital relation as a condition to the right of the court to award the wife suit money and attorney's fees. *Hector v. Hector*, 51 Wash. 434, 99 Pac. 13; *Lake v. Lake*, 194 N. Y. 179, 87 N. E. 87; *Bishop v. Bishop*, 165 App. Div. 954, 150 N. Y. Supp. 660.

After the parties have been divorced and their property rights settled, the reason for the payment of attorney's fees by the husband no longer exists, as the court in dividing the property of the litigants takes into consideration their earning capacity in the future. Thereafter they sustain the rela-

tion of strangers toward each other, and certainly it could not be seriously contended that a stranger in an action of this kind would be entitled from the opposing party to suit money and attorney's fees.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13480. Department Two. November 16, 1916.]

WILLIAM R. ARMSTRONG *et al.*, *Respondents*, v. MODERN
WOODMEN OF AMERICA, *Appellant*.¹

APPEAL—REVIEW—NEW TRIAL—DISCRETION. Where the evidence is conflicting, the refusal of the trial court to grant a new trial on the ground of the insufficiency of the evidence will not be reviewed except for abuse of discretion; and it is not an abuse of discretion where there was substantial evidence upon which to rest the verdict.

INSURANCE—MUTUAL BENEFIT CERTIFICATES—ACTIONS—PROOF OF DEATH—CONCLUSIVENESS OF STATEMENTS. In an action upon a mutual benefit certificate, the statements in the proofs of death are not conclusive on the beneficiary, in the absence of facts creating an estoppel.

EVIDENCE—HEARSAY EVIDENCE—RECITALS IN RECORDS OF MARRIAGE LICENSE—FACT OF AGE. Where, by the statute of a sister state, the recorder had no right to issue a marriage license to a male person under twenty-one without the consent provided for and it was his duty to make a record of the fact, a certified copy of a marriage license, tending to support a claim that an insured person was then over twenty-one years of age, is admissible in evidence upon the question of his age, for what it was worth, constituting a recognized exception to the hearsay rule.

EVIDENCE—DECLARATIONS OF INSURED—ADMISSION AGAINST BENEFICIARY. The declarations of the insured as to his age are, in actions upon mutual benefit insurance, admissible against the beneficiary.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered June 16, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on a benefit certificate. Reversed.

¹Reported in 160 Pac. 946.

Davis & Heil, Chas. L. Chamberlin, and Truman Plantz,
for appellant.

John Pattison and J. P. Burson, for respondents.

MAIN, J.—The purpose of this action was to recover upon a benefit certificate, issued by the defendant, Modern Woodmen of America, to George E. Armstrong, the father of the plaintiffs. The defendant interposed the defense that George E. Armstrong, in his application for membership in the order, misrepresented his age. The trial of the cause resulted in a verdict for the plaintiffs. From the judgment entered upon this verdict, the defendant appeals.

The facts necessary to an understanding of the material questions for determination are these:

During the year 1903, George E. Armstrong made application for membership and insurance in the Modern Woodmen of America, a fraternal beneficiary society. In his application for membership, Armstrong represented that he was born on the 10th day of July, 1862. The application for membership was accepted and a benefit certificate duly issued, in which the respondents in this action were named as beneficiaries. George E. Armstrong died on the 11th day of February, 1913. From the time of the issuance of the benefit certificate to the date of the death of the insured, all dues, assessments, and demands of the society had been paid. After the death of George E. Armstrong, proof of his death was submitted in accordance with the requirements of the appellant. In the application for membership, it was declared that all answers and statements therein were true and were to be a condition precedent to any binding contract issued upon the faith of such answers and statements. One of these statements was that the applicant was born on the 10th day of July, 1862. When the proofs of death were submitted to appellant, it appeared from certain statements therein that the insured was born some time prior to the year 1862. For

this reason, the appellant refused to pay the beneficiaries named in the certificate the amount of the insurance specified therein. After this refusal, the present action was instituted.

The first question is whether the trial judge erred in denying the motion for a new trial, because there was not sufficient evidence to sustain the verdict. The appellant contends that the great weight of evidence was to the effect that George E. Armstrong was born on the 10th day of July, 1858, instead of on the 10th day of July, 1862, and since the great weight of the evidence sustains this contention, there is no substantial conflict in the evidence, and a motion for a new trial should have been granted. In support of this contention, the case of *Guley v. Northwestern Coal & Transportation Co.*, 7 Wash. 491, 35 Pac. 372, is cited. It is true that in that case is found a declaration that where the clear weight of the evidence is with either side, there is no substantial conflict, and the court should take the decision of the case from the jury, but that decision is no longer authority. In the case of *Money v. Seattle, Renton & Southern R. Co.*, 59 Wash. 120, 109 Pac. 307, it was referred to in this language:

"The *Guley* case has been criticized in this court in respect to the question we are considering until it is no longer authority on the subject. Where there is a substantial conflict in the evidence, and the trial court has refused a new trial and has instructed the jury that the weight of the evidence does not necessarily depend upon the relative number of witnesses testifying for or against a given issue, and that they are the sole judges of the credibility of the witnesses and the weight of the testimony, it would involve a legal absurdity for this court to reverse the judgment entered upon the verdict on the ground of the insufficiency of the evidence. To believe one witness and to disbelieve another or others is one of the admitted functions of the jury, and in this respect it cannot be censored or controlled by the courts. While it is true that verdicts must be based upon evidence, it is likewise true that the trial judge is not required to grant a new trial in every case where his opinion upon the facts differ from the opinion of the jury as expressed in the verdict."

Whatever the rule may be in other jurisdictions, it is well settled in this state that, where a cause is tried to a jury, and the trial court declines to grant a new trial in response to the contention that the verdict is against the weight of the evidence, this court will not disturb the holding of the trial court, even though it may believe that the weight of the evidence is against the verdict of the jury, unless it shall appear that the trial court abused its discretion in refusing to grant the new trial. *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266, 140 Pac. 377; *Independent Brewing Co. v. McCrimmon*, 85 Wash. 610, 148 Pac. 787; *Payzant v. Caudill*, 89 Wash. 250, 154 Pac. 170.

In the present case, there was substantial evidence upon which the verdict of the jury could rest. At least one witness, a man sixty-one years of age, testified positively that George E. Armstrong was born in the state of Missouri during the year 1862. He detailed certain facts and circumstances which would lend support to his memory. To say that, in the light of this testimony, there was no substantial evidence to support the verdict would amount to usurpation by this court of the functions of the jury.

It is also claimed that a recovery should be denied the respondents, as a matter of law, because, in the proofs of death filed with the appellant, the age of the insured was stated as fifty-four years and seven months, which, if true, would make the date of his birth earlier than 1862. But where the action is brought upon a contract of mutual benefit insurance, as in this case, statements made in the proofs of death are not conclusive on the beneficiary, in the trial of the case, in the absence of facts creating an estoppel. The beneficiary has the right to controvert the statements made in the proofs of death. 3 Elliott, Evidence, § 2387; 29 Cyc. 150; *Supreme Tent Knights of Maccabees v. Stensland*, 206 Ill. 124, 68 N. E. 1098, 99 Am. St. 137; *Modern Woodmen of America v. Davis*, 184 Ill. 236, 56 N. E. 300.

In the case last cited, it was stated that:

"Proofs of death, if in compliance with the requirements of the order, form a legal basis for an action on a certificate issued by the order, even though the proof contain matter damaging to the case of the beneficiary. 13 Am. & Eng. Ency. Law, 65. The real cause of death remained a question of fact, in the elucidation whereof the beneficiary was not restricted to the testimony of the physician. Her right to recover could not be conclusively determined from the affidavit of the physician filed by her, because the rule of the order required it to be filed. Nor was she estopped to combat the truth of the affidavit of the physician. . . ."

There are no facts in this case which would create an estoppel, and the trial court did not err in refusing to overturn the verdict of the jury on this ground.

The next question is whether error was committed by the trial court in the refusal to admit in evidence a certified copy of the record of the marriage of George E. Armstrong and Fannie Cotton, in the state of Missouri, on the 9th day of October, 1882. After making the necessary preliminary proofs, the copy of the marriage license, issued by the recorder of Clark county, Missouri, and the return thereof by the minister performing the marriage ceremony, was offered in evidence, and upon objection being made, the trial court declined to admit it. In regard to the admission in evidence of official registers and certified copies thereof, the rule appears to be that such registers are admissible in evidence of any facts required to be recorded in them, or which occur in the presence of the registering officer. 1 Greenleaf, Evidence, § 493; *Evanston v. Gunn*, 99 U. S. 660; *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524; *Murray v. Supreme Hive Ladies of Maccabees of the World*, 112 Tenn. 664, 80 S. W. 827; *Priddy v. Boice*, 201 Mo. 309, 99 S. W. 1055, 119 Am. St. 762, 9 L. R. A. (N. S.) 718.

The controversy here is not so much over a statement of the rule as its application. The question then arises whether it was the duty of the recorder, upon issuing the marriage

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license, to determine and record the fact as to the age of the applicant. At the time the marriage license in question was issued, the statutes of the state of Missouri contained a section which provided that:

“No recorder shall issue a license authorizing the marriage of any male person under the age of twenty-one years, or female under eighteen, except with the consent of his or her father, or if he is dead or incapable, or not residing with his family, of his or her mother or guardian, as the case may be, if he or she have one, which consent, if not given at the time in person, shall be evidenced by a certificate, in writing, subscribed thereto and duly attested. The recorder shall state in every license whether the parties applying for the same, one or either or both of them, are of age, or whether either or both are minors, and if either party is a minor, the name of the father, mother or guardian consenting to such marriage. (Laws 1881, p. 162-c.)” Revised Statutes of Missouri, § 6850.

By this statute, the recorder had no right to issue a license to a male person under the age of twenty-one years, except with the consent provided for therein. It is made the duty of the recorder to state in every license whether the parties applying for the same, one or either or both of them, are of age, and if either party be not of age, then the name of the person consenting to such marriage shall be stated. In the marriage license issued to George E. Armstrong and Fannie Cotton, the age of the former was stated to be over twenty-one years. If this marriage certificate is admissible in evidence on the question of age, it would tend to support the claim that George E. Armstrong was born prior to the year 1862. The duty being placed upon the recorder by the statute of the state of Missouri to determine, before he issued a marriage license to a male person, that such person was over the age of twenty-one years, a marriage license issued, reciting the age, would be within the rule relative to the admission of official registers, and would be admissible in evidence upon the question of age. It is not, of course, conclusive, but it is ad-

missible for what it may be worth. In *Murray v. Supreme Lodge, New England Order of Protection*, 74 Conn. 715, 52 Atl. 722, the Supreme Court of Errors of Connecticut had this question before it, and, in passing on the same, used this language:

"It thus appears that the age of Ellen T. Murray, at the time of her marriage, and at the time of the birth of her children, was a fact which the law made it the duty of the registrar to ascertain, and to make and keep a record of the fact so ascertained. The record thus made was a public record, made by a public official, of a fact which the law required him to find and record, and the record was open to public inspection. The record thus made of this fact the defendant offered in evidence, both in the shape of the record itself, and of a duly certified copy thereof, and the court excluded it on the ground, substantially, that it was hearsay evidence. Now, unquestionably the evidence offered and excluded was hearsay evidence, for it was a statement made extrajudicially by one not under oath and not subject to cross-examination, and it was offered in proof of one of the facts stated in it, to wit, the age of Mrs. Murray. Statements so made are generally obnoxious to the hearsay rule, but to that rule there are many exceptions as well established as the rule itself; and among them is one admitting statements made by public officials in a public record made for public use pursuant to law. The books of the registrar, kept according to law, constitute a public official register; and the statements contained therein, when relevant, are admissible in evidence as a clear exception to the hearsay rule. The necessity for the existence of such an exception is found 'in the practically unendurable inconvenience of summoning public officers from their posts on the innumerable occasions when their official doings or records are to be proved in litigation;' and the general trustworthiness of such evidence is found in the circumstances under which the statements are made. 1 Greenleaf on Ev. (16 ed.), §§ 162m. 484-486. *Sturla v. Freccia*, L. R. 5 App. Cas. 623; *Evans-ton v. Gunn*, 99 U. S. 660; *Cushing v. Nantasket Beach R. Co.*, 143 Mass. 78; *Enfield v. Ellington*, 67 Conn. 459, 462; *Hennessy v. Metropolitan Life Ins. Co.*, ante p. 699.

"The evidence offered and excluded in the case at bar comes clearly within this exception to the hearsay rule, and was ad-

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missible in proof of the age of Mrs. Murray at the time of her marriage, and at the dates when her children were born. 1 Greenleaf on Ev. (16 ed.), § 493. It was not, of course, conclusive, nor was it offered as such; but it was admissible for what it was worth, and the court erred in excluding it."

It may be that the recorder, reciting the fact of age, relied upon the declaration of the applicant, but this would not render it inadmissible. In mutual benefit insurance, the contract is between the society and the member, and the beneficiary has only an expectant interest. The member insured has full power and dominion over the contract until the time of his death. The beneficiary, prior to such death, has no vested interest in the contract. The declarations of the insured are admissible against the beneficiary, just as they would be against his legal representative. Niblack, *Benefit Societies and Accident Insurance*, § 325; *Thomas v. Grand Lodge, Ancient Order of United Workmen*, 12 Wash. 500, 41 Pac. 882; *Hansen v. Supreme Lodge Knights of Honor*, 140 Ill. 301, 29 N. E. 1121; *Supreme Conclave Knights of Damon v. O'Connell*, 107 Ga. 97, 32 S. E. 946.

The failure to admit in evidence the marriage license was reversible error. From the record in the case, we are unable to say that, had this been admitted, it would not have caused a different verdict to be returned.

Some of the authorities cited by the respondents in support of the ruling of the trial court should be noticed and the distinction pointed out. In *Connecticut Mut. Life Ins. Co. v. Schwenk*, 94 U. S. 593, there was offered in evidence the minute book of the lodge of Odd Fellows, for the purpose of showing the age of a member recorded therein. It was there held that the book was not properly admissible for this purpose, apparently for two reasons. First: Entries in the minute book could not be regarded as admissions of the person named therein respecting his age, and second; it does not appear that any duty was imposed upon the keeper of the minute book to ascertain and record the ages of the members.

In *Hegler v. Faulkner*, 153 U. S. 109, a report of the names of Indians and half-breeds entitled to participate in an allotment of land, under the Federal statutes, to the Indian Bureau under instructions to report in full a list of all applicants, showing names, age, sex, etc., was held not admissible in evidence in an action between two parties, each of whom claims under the same person and the same allotment, in order to show the age of that person at the time of the allotment. But, as stated in the opinion in that case:

“ . . . neither the treaty, the act of Congress, nor the instructions of the department contemplated any special inquiry into the ages of the Indians.”

In the present case, the Missouri statute contemplated a special inquiry by the recorder into the ages of the applicants for a marriage license.

If the case of *Mutual Benefit Ins. Co. v. Tisdale*, 91 U. S. 238, is not distinguishable, then it is not in harmony with the later holding of the same court in *Evanston v. Gunn*, 99 U. S. 660.

There are other grounds urged for a reversal, but these need not be discussed. They are not only without substantial merit, but are such as were incidental to the particular trial and not likely to occur in another trial of the cause.

The judgment will be reversed, and the cause remanded for a new trial.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

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Opinion Per ELLIS, J.

[No. 13332. Department One. November 17, 1916.]

CITIZENS BANK & TRUST COMPANY, *Appellant*, v.
C. B. LIMPRIGHT *et al.*, *Respondents*.¹

BILLS AND NOTES—BONA FIDE HOLDER—DUTIES—EVIDENCE—SUFFICIENCY. There can be no imputation of bad faith from the fact of taking negotiable paper, fair on its face, without active inquiry, nor by mere speculation as to diligence or negligence, and evidence going no further, and showing no actual notice, is insufficient to sustain findings that plaintiff was not a *bona fide* purchaser for value.

SAME—BONA FIDE PURCHASER—COLLATERAL EXECUTORY AGREEMENT—NOTICE—"DEFECTIVE" TITLE. Where defendant gave a note for the full purchase price of an automobile, with a collateral executory agreement that the valuation of his old car, traded in at the time, instead of being then credited, should be applied in part payment of the note sixty days hence, the plain purpose was to enable the seller to raise money on the note, and knowledge thereof would not charge a purchaser with bad faith or make his title "defective" under Rem. 1915 Code, § 3446; since he did not obtain it by fraud, duress, unlawful means or for illegal consideration nor pledge it in breach of faith, no breach of the executory agreement having occurred.

SAME—BONA FIDE HOLDER—AMOUNT OF RECOVERY—DISCOUNT. Under Rem. 1915 Code, § 3418, declaring that, where the holder has a lien on the instrument, he is deemed a holder for value to the extent of the lien, a bank taking a note as collateral to a loan for eighty per cent of its face, can recover from the maker, having a good defense as against the payee, only to the extent of the lien, with interest at the legal rate, in the absence of any evidence as to the rate of interest agreed upon.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered September 25, 1915, upon findings in favor of the defendants, dismissing an action upon a promissory note, tried to the court. Reversed.

Sherwood & Mansfield, for appellant.

Cooley, Horan & Mulvihill, for respondents.

ELLIS, J.—Plaintiff, claiming to be a *bona fide* holder for value, brought this action to recover \$1,150 as a balance due

¹Reported in 160 Pac. 1046.

upon a promissory note, together with interest, costs and attorney's fees. The defense was that plaintiff was not a *bona fide* holder for value. Certain facts are not disputed. On February 21, 1914, defendant husband gave to one Pittman, doing business as Riverside Carriage & Auto Company, a negotiable promissory note for \$1,600, bearing interest at the rate of eight per cent per annum, and reciting, "\$1,150 due April 21, 1914, balance at rate of \$100 per month." The circumstances under which the note was given were these: Pittman, as the auto company, sold to defendant an automobile at a price of \$1,600, agreeing to take defendant's old car in part payment at a valuation of \$1,150, the balance of \$450 to be paid in four monthly payments of \$100 each and one of \$50. The old car was at once delivered to the auto company and the new car to defendant, who received in return for his note the following memorandum of agreement:

"Everett, Wash., 2-21, 1914.

"We hereby agree to allow C. Limpricht \$1,150 for his 35 Studebaker car, same to be paid and applied on a certain note for \$1,600, this is to be applied on sixty days from date on said note of \$1,600. Riverside Carriage & Auto Co.,

"By L. R. Pittman."

On February 26, 1914, the note was transferred by indorsement to plaintiff as collateral to a loan of \$1,280. Defendant thereafter made payments on the note as follows: \$200 on April 4, 1914, \$100 May 5, 1914, \$100 June 3, 1914, \$50 July 7, 1914. These payments were made to the auto company and were credited on the note by the bank. Two questions of fact are in dispute. Plaintiff's cashier, with whom the transaction was had, testified that, when the note was negotiated at the bank, he had no notice or knowledge of the circumstances under which the note was given nor any notice or knowledge of the collateral agreement, and did not learn of these things till about six months afterwards. Pittman testified that, either at the time of the transfer or soon afterwards, "I told them I had a car to sell and the

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proceeds applied on the note in sixty days from the time I accepted the note." He did not testify that he showed to the cashier or any one connected with the bank the collateral agreement, or that he advised any one connected with the bank of the terms of that agreement or even of its existence. The other disputed fact is as to when notice of the negotiation of the note was first given to defendant. Plaintiff's cashier testified that, on February 26, 1914, he wrote to defendant advising him that the bank held the note; that, while he had no independent recollection of the matter, he knew it because that date was stamped on the back of the note, and that it was his universal custom to so stamp the date on sending such notices. Defendant denied ever having received any notice of that date. On October 1, 1914, the cashier wrote defendant as follows:

"Your note to the Riverside Carriage & Auto Company, assigned to this bank, is past due as to several monthly payments of \$100 each, and we must therefore urge this matter upon your prompt attention, and oblige."

Defendant testified that this letter conveyed to him the first notice he ever received that the bank held the note. He afterwards admitted, however, that he paid the first installments to one Gay, an employee of the auto company, who then told him he would take the checks to the bank and that he, defendant, then supposed the bank had the note. Pittman, on May 27, 1914, sold the old car for \$749.70, took a note in payment and sold this note to plaintiff bank for eighty per cent of its face. There was no evidence that any one connected with the bank had any knowledge or notice that this note represented the proceeds of the old car received by Pittman from defendant. Pittman testified: "I never said a word to them about that."

The cause was tried to the court without a jury. The court found that plaintiff took the note prior to its maturity but with full knowledge and notice of the collateral agreement between defendant and Pittman, and took it subject to

that agreement, and that the note had been paid in full. Judgment was entered dismissing the action with costs to defendants. Plaintiff appealed.

It is contended (1) that the evidence was insufficient to charge appellant with notice or knowledge of the collateral agreement when it took the note; (2) that the collateral agreement being still executory when the note was indorsed, knowledge of its existence could not deprive appellant of its character of *bona fide* indorsee in due course.

The taker of negotiable paper, fair upon its face, does not owe to the party who gives it currency the duty of active inquiry in order to avoid the imputation of bad faith. His rights are to be measured "by the simple test of honesty and good faith," not by mere speculation as to his diligence or negligence. It is not enough to impeach his good faith that he may have been negligent or may have failed to take precautions that a prudent man would have taken. *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903; *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. 1042; *Scandinavian-American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102. As we read the evidence, the full purport of which we have set out in our statement, it falls far short of showing knowledge on appellant's part when it took this note of any agreement on Pittman's part to credit upon the note \$1,150, or any other sum, as the price of the old car. We shall not further discuss the evidence on this point, since, even were it conceded that appellant had full knowledge of the collateral agreement, that fact would not charge it with bad faith.

If, as between the parties, at the time of the delivery of the old car it was to be considered as an immediate payment of the \$1,150, the written agreement to treat it as a payment sixty days from that date would be nugatory and meaningless. That agreement was an executory agreement to apply the \$1,150 as the valuation of the old car upon the note, not immediately, but sixty days from that date. It was a contemporaneous agreement to do the thing at a future time

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as part of the consideration for the note. The plain purpose of the giving of the note for the full price of the new car without then crediting upon it the \$1,150 was to enable Pittman to raise money upon the note. On the face of the transaction no other purpose is conceivable. Moreover, the oral evidence conclusively so shows. Respondent, when asked why it was that he gave the note for the full price of the new car when he turned in the old car said: "He (Pittman) wanted sixty days to turn the old car." Pittman, when asked why he took the note when he already had the old car, answered:

"In the first place we had to pay cash for the cars when we received them, and we either had to pay for the cars or do without them, and we could not sell the cars unless we took paper or did something to negotiate for cash for the cars."

There is not a word of evidence that Pittman agreed not to negotiate the note or that respondent ever asked him not to negotiate it. In giving the note and taking the collateral agreement, respondent clearly relied upon the financial responsibility and integrity of Pittman for the fulfillment of that agreement. *Moyes v. Bell*, 62 Wash. 534, 114 Pac. 193. Such being the necessary purport and purpose of the agreement, Pittman's title to the note was not defective within the meaning of § 55 of the negotiable instruments act (Laws 1899, p. 350; Rem. 1915 Code, § 3446) when he negotiated it. He did not obtain it by fraud, duress or other unlawful means, nor for an illegal consideration, nor did he pledge it in breach of faith, as that was the only conceivable purpose for which it was given. When he pledged it, his collateral agreement to credit the maker with \$1,150 was still executory. No failure of consideration for the note had then developed. Appellant took the note as a *bona fide* holder in due course, regardless of any knowledge it may have had of the collateral agreement. This court, following preponderant authority, has repeatedly held that knowledge of the indorsee of a note given in consideration of some executory contract or agreement of the payee, which the payee thereafter fails

to perform, will not deprive the indorsee of his character of a *bona fide* holder in due course, unless prior to his taking he had notice that the breach of the executory agreement had already occurred. See *Moses v. Bell*, *supra*, and the numerous decisions there cited and quoted. See, also, *German American Bank of Seattle v. Wright*, 85 Wash. 460, 148 Pac. 769, a case closely related to this on the facts.

The trial court seems to have been of the opinion that respondent was wholly without fault and that the equities of the case were clearly with him. We cannot so read the evidence. He gave his note to Pittman without any indicia whatever that it was not to be negotiated and without any agreement that it was not to be negotiated. If the note was not to be used, the reasonable thing, the safe thing, and the thing which would have protected all parties absolutely was not to give it. By giving it and taking the collateral agreement, he reposed confidence in Pittman personally and in Pittman alone. To permit that agreement to defeat the note in appellant's hands and for which it had admittedly paid value, would place all of the care and caution touching negotiable paper upon the taker rather than upon the maker, thus reversing the law merchant and the negotiable instruments act and running counter to that cardinal rule of equity that he who makes a loss possible should suffer the loss.

But it does not follow that appellant is entitled to recover the full balance due on the note. The evidence is conclusive that it took the note as collateral to a loan for eighty per cent of its face, or \$1,280. The statute, § 27 of the negotiable instruments act, Rem. 1915 Code, § 3418, declares:

"Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

Appellant has a lien upon the note arising from contract. Under this statute it is to be deemed the holder for value only to the extent of that lien. Appellant failed to offer any evidence as to the rate of interest its loan to Pittman was to

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bear. It therefore can recover interest at the legal rate only. So computing the interest and applying the partial payments made upon the note first to the interest and then to the principal, there remained due to appellant on July 7, 1914, the date of the last payment, a balance of \$858.45. Appellant is entitled to judgment for this amount, with interest from that date at the rate of six per cent per annum, and for an attorney's fee of \$50, which respondents in their answer admit to be reasonable.

The judgment is reversed, and the cause is remanded for entry of judgment for appellant and against respondent C. B. Limpright and the community consisting of C. B. Limpright and Josephine Limpright in accordance with this opinion.

MORRIS, C. J., MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 13367. Department One. November 17, 1916.]

CYCLOHOMO AMUSEMENT COMPANY, *Respondent*, v.
HAYWARD-LARKIN COMPANY, *Appellant*.¹

LIBEL AND SLANDER—WORDS LIBELOUS PER SE—INJURY TO BUSINESS—STATUTES. Billboard posters, printed in red ink, stating that theaters employing incompetent help are dangerous, those employing competent help display a union card, and that plaintiff's theater cannot display such card, are libelous *per se*, within the definition of libel in Rem. 1915 Code, § 2424, relating to publications that injure a person in his business or occupation.

SAME—LIBEL PER SE—DAMAGES—LOSS OF PATRONAGE—EVIDENCE. Where a publication is libelous *per se* as injuring one's business, a recovery of substantial damages is sustained by proof of loss of patronage without other evidence of the amount of damages.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered July 1, 1914, upon findings in favor of the plaintiff, in an action for libel, tried to the court. Affirmed.

¹Reported in 160 Pac. 1051.

Charles P. Lund, for appellant.

Thos. A. Scott, for respondent.

MOUNT, J.—This action was brought to recover damages to plaintiff's business by reason of the publication of an alleged libel by the defendant. The case was tried to the court without a jury. Upon the trial, the court made findings and conclusions in favor of the plaintiff, and assessed damages against the defendant in the sum of \$300. The defendant has appealed from a judgment entered upon the findings.

It appears that the plaintiff was engaged in the moving picture theater business in the city of Spokane, and was conducting the Majestic theater. The defendant was engaged in the advertising business in said city. Prior to February 11, 1913, the plaintiff had some differences with the moving picture operators' union and was not employing union men in its theater. About that date certain members of the union caused to be printed and delivered to the defendant's plant for posting a number of posters which the court held to be libelous. These posters are two feet wide by three feet long. They are printed in bright red ink upon a white sheet of paper. At the top in large letters is the word "Danger." Following this in smaller letters are these words, "Do you know that a theatre that employs incompetent operators endangers your life? Do you know that the theatres that employ competent help display this card in the box office?" Then follows a copy of a union card. Following the card are these words, "Do you know that the Arcade and Majestic theatres *cannot* show this card?"

These posters were posted upon defendant's billboards and were distributed about the city of Spokane. There is no dispute as to the fact of posting, but there is some dispute as to the length of time some of these posters remained posted.

Two points are made by the appellant upon this appeal. First, that the posters as published by the appellant are not

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libelous *per se*; and second, if libelous, there was no proof to sustain a judgment of \$300.

The poster, upon its face, very clearly states that theatres which employ incompetent help endanger the lives of the patrons of such theatres, that theatres which employ competent help display a union card, and then the poster says, "Do you know that the Arcade and Majestic theatres *cannot* show this card?" Here is a direct and positive declaration that the Majestic theatre is a dangerous place because of incompetent help. Nothing else can be made of this poster. It is printed in red ink upon a white background, indicative of danger. There can be no doubt that the object of displaying these posters upon the bill boards in the city of Spokane was to prevent people from attending the theatres named. It had no other object.

The statute, at § 2424, Rem. 1915 Code, provides,

"Libel Defined. Every malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which shall tend: . . . (3) To injure any person, corporation or association of persons in his or their business or occupation, shall be a libel."

The next section provides:

"Every publication having the tendency or effect mentioned in section 2424 shall be deemed malicious unless justified or excused."

There can be no doubt that the purpose of displaying these posters in the public places of Spokane was to injure the Majestic theatre in its business. These posters were clearly libelous *per se* within the terms of the statute. *Wilson v. Sun Publishing Co.*, 85 Wash. 503, 148 Pac. 774.

It is next contended that there was no proof to justify a judgment of \$300. As we have seen above, the posting of these posters was libelous *per se*. The rule is stated in 25 Cyc. 531, as follows:

"If the publication is actionable *per se*, plaintiff is not required to introduce evidence of actual damage to entitle

him to substantial damages. Since in the absence of any evidence of damage the law presumes damages."

And in the same volume at page 533:

"Under a general allegation of loss of business it is competent for plaintiff to prove a general loss or decline of patronage. Moreover where the words are actionable *per se* as affecting plaintiff in his business the jury may award such substantial damages as will compensate for the general injury to business, although no evidence whatever as to damages is offered by plaintiff."

In this case, however, the respondent offered evidence showing a decline in patronage after the publication of these posters, and if the general rule were not as above stated, we are satisfied that there is sufficient in the evidence to show that the court was very moderate in assessing damages in the sum of \$300.

We find no error in the record, and the judgment is affirmed.

MORRIS, C. J., FULLERTON, ELLIS, and CHADWICK, JJ., concur.

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Syllabus.

[No. 13394. Department One. November 17, 1916.]

**W. D. GODEFROY, as Northern Pacific Land Exchange,
Respondent, v. FRED R. HUPP et al., Appellants.¹**

BROKERS—COMMISSIONS—PROCURING CAUSE—QUESTION FOR JURY. Whether brokers were the procuring cause of an exchange of properties, is a question for the jury, where they produced the person ready, able and willing to make the exchange, and it is immaterial that the exchange as finally concluded by the principal did not embrace all the property listed.

SAME—VALIDITY OF CONTRACT—DIVISIBILITY—REALTY AND PERSONALTY. An oral contract for the payment of commissions on the sale of real estate being void under Rem. 1915 Code, § 5289, a contract for commissions on the exchange of both real and personal property, if indivisible, is subject to the bar of the statute in its entirety.

TRIAL—PROVINCE OF COURT AND JURY—CONTRACTS. Whether a contract is divisible is a question of law dependent upon the terms of the contract; and what the terms are is a question of fact dependent upon the evidence.

SAME—QUESTIONS OF FACT—NONSUIT—JUDGMENT. Upon challenge to the sufficiency of the evidence, a nonsuit or judgment *non obstante* can be granted only when there is neither evidence nor reasonable inference from the evidence to sustain a verdict.

BROKERS—CONTRACT FOR COMMISSIONS—DIVISIBILITY—VALIDITY—STATUTE OF FRAUDS. An oral agreement to pay a commission on any sale or exchange of defendant's real estate or stock (whether of the real estate alone, the stock alone, or both together) is severable, as the several stipulations are not so interdependent but that a distinct engagement as to any one may be fairly extracted from the whole; hence, on an exchange of both real and personal property, the commissions as to the personalty put in at a definite value is not within the bar of the statute of frauds.

SAME—DIVISIBILITY OF CONTRACT—EVIDENCE—ADMISSIBILITY. In such a case, the broker is not bound by the written contract of exchange, to which he was a stranger, fixing no definite value upon the personalty, but may show by parol evidence the value at which the personalty was estimated in the trade.

CUSTOMS AND USAGES—CONTRACT FOR COMMISSIONS—RATE. In the absence of evidence as to the rate of commissions to be paid on an

¹Reported in 160 Pac. 1056.

exchange of personal property, the broker is entitled to recover such rate as was usually and customarily paid at the place in question.

APPEAL—REVIEW—HARMLESS ERROR. Appellant cannot complain that the jury estimated commissions for the exchange of property at a lower rate than the respondent was entitled to.

HUSBAND AND WIFE—COMMUNITY DEBT—LIABILITY OF WIFE. The wife is not personally liable upon a contract by her husband to pay a commission for the exchange of personal property belonging to himself and the community.

ATTACHMENT—COMMUNITY PROPERTY—PARTIES. In an attachment upon community property, it is not necessary to name the wife as a party to the attachment, and it only binds the property on which it is levied.

SAME—DISSOLUTION—MOTION. In the absence of a motion to dissolve an attachment below, it is too late to seek its dissolution on appeal after it had been carried into the judgment.

TRIAL—CONDUCT—REOPENING—DISCRETION. It is discretionary for the trial court to reopen a case for the taking of further evidence.

TRIAL—RECEPTION OF EVIDENCE—OFFER OF PROOF. A general offer of further evidence upon a point, without offer of any specific evidence or statement as to what a witness would testify to or that it was not merely corroborative, is insufficient to predicate error on its rejection.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 2, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action to recover a broker's commission. Modified.

Peacock & Ludden, for appellants.

McCarthy, Edge & Davis, for respondent.

ELLIS, J.—Action by a broker for services rendered in an exchange of personal property for real estate. There was evidence tending to establish the following facts: About December 1, 1913, defendants were the owners of certain real property and also of one hundred shares of the capital stock of Holland-Horr Mill Company, a corporation, as their community property. Defendant Fred R. Hupp employed plaintiff to make a sale or exchange of this property or any

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part of it, agreeing to exchange any portion of it, either the stock alone or the real property alone or some of the real property and some of the stock, for other property, preferably a stock ranch or wheat farm. Hupp gave to plaintiff a list of the property, placing separate valuations on each item. The valuation placed on the Holland-Horr Mill Company stock was \$800 a share. He promised to pay plaintiff a commission for making such a sale or exchange. For a number of months thereafter, plaintiff exerted himself to make a sale or exchange of this property and different parts of it. Different negotiations were had with Hupp's approval involving prospective sales or exchanges of the stock alone. He was willing to sell or exchange the stock alone.

About four months after the property was listed with him, plaintiff employed one Mulcahy as an assistant in his office, agreeing to pay him one dollar a day and divide commissions on sales or exchanges of property in which he might assist. Mulcahy immediately wrote to various persons soliciting business. One of these, Schuler, a broker of Minneapolis, Minnesota, answered, returning a list of Minnesota properties among which was the Minnesota Loan & Trust Company building in Minneapolis, owned by the Franklin Avenue Investment Company, a corporation. The value of this building was placed at \$350,000. There was a mortgage upon it for \$155,000. Mulcahy submitted this list to defendant Hupp, who expressed himself as willing to exchange his property for this building. He made and delivered to Mulcahy a new list of his property, again placing a value of \$800 a share on the one hundred shares of Holland-Horr Mill Company stock, and added a block of stock of the Dakota Oil Sands Company, a corporation owning certain oil lands at Calgary, Alberta. On this stock he placed a valuation of \$5,000. Just here arises the first serious conflict in the evidence. Mulcahy testified that he then told Hupp that, in case of an exchange, the commission on the Holland-Horr Mill Company stock would be ten per cent, and

more than ten per cent on the Dakota Oil Sands Company stock. Hupp denied that, at this time, any mention was made of the commissions. After this for some time Mulcahy corresponded with Schuler, receiving from him photographs of the Minneapolis building, statements, letters, and telegrams, which Mulcahy submitted to Hupp. Among these was a letter from Schuler in part as follows:

Minneapolis, June 5, 1914.

Dear Geo.: I have your letter in answer to my wire. The deal can be put through something like this:

Cash	\$40,000
H Horr Stk.....	50,000
Adams River	50,000
Lincoln Co.	5,000
Corbin Park	18,000
Castor Alta	8,000
Hayden Lake	5,000
St. Joe	5,000
1-8 Int. Calgary Oil Co.....	15,000

\$196,000

He says Bradstreet can report on the properties in five days if they want to trade. . . .

Yours truly,

Henry Schuler.

Mulcahy testified that he submitted this letter to Hupp, and that thereafter throughout the negotiations the Holland-Horr Mill Company stock was valued at \$500 a share instead of \$800 a share as included in Hupp's original list. About the middle of June, 1914, Hupp, without notice to plaintiff or Mulcahy, went to Minneapolis and concluded the exchange. At this point arises the second serious conflict in the evidence. Both Mulcahy and plaintiff, Godefroy, testified that, on Hupp's return from Minneapolis, he admitted to them that he had included in the exchange ninety shares of the Holland-Horr Mill Company's stock at a valuation of \$500 a share, and the oil stock at a valuation of \$15,000. Hupp denied making this statement and testified in substance that, when he exchanged his real estate for the Minneapolis building, he threw in the stocks without placing upon them

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any specific values. Upon Hupp's return to Spokane after concluding the deal, plaintiff demanded from him a commission on the entire deal, including the stock and the real estate. Defendant refused to pay any commission on the ground that plaintiff had no contract in writing. This action followed. A writ of attachment was sued out and levied upon certain real estate as the property of Fred R. and Ella Hupp. At the trial, defendants objected to the introduction of any evidence upon the ground that the contract pleaded was within the statute of frauds, and at the close of plaintiff's evidence moved for a nonsuit upon the same ground. The motion was denied. The jury returned a verdict for plaintiff in the sum of \$3,750. Defendant moved for judgment *non obstante veredicto* and also for a new trial. Both motions were overruled. Judgment was entered upon the verdict, and defendants appealed.

Appellants contend, (1) that the contract for commissions was indivisible and, being oral, was subject to the ban of the statute of frauds because it included real estate; (2) that the judgment against defendant Ella Hupp individually was in any event erroneous; (3) that the court erred in carrying the attachment into the judgment; (4) that the court erred in opening the case for admission of evidence and in excluding evidence offered in rebuttal of such evidence.

Whether respondent, through Mulcahy, was the procuring cause of the exchange as finally consummated was plainly a question for the jury. That they produced the person ready, able and willing to make the exchange cannot be questioned. The fact that the exchange as finally concluded did not embrace quite all of the real estate included in appellants' list as left with respondent and did include certain machinery, a team, harness and wagon not included in that list, is immaterial. It is clear that in the main the exchange was concluded along the lines contemplated in Mulcahy's correspondence with Schuler, which was submitted to Hupp and led to

his going to Minneapolis and closing the deal. In such a case, if the contract for the commissions had been in writing, there can be no question but that respondent would have had a maintainable cause of action for commissions on the entire transaction. *Price v. Partridge*, 78 Wash. 362, 139 Pac. 34.

But the contract for the payment of the commissions, being oral, was void so far as the real estate was concerned. Rem. 1915 Code, § 5289. It is also clear that, if that contract was not divisible, it was subject to the ban of the statute in its entirety so as to preclude a recovery of any commission even for the exchange of the stock. In considering this question, we must not confuse the two contracts. The primary question here is not whether the contract of exchange as finally consummated between Hupp and Franklin Avenue Investment Company was a divisible contract, but whether the agreement creating the agency as between Hupp and Godefroy and to pay the commissions was divisible. It is the latter agreement upon which this action rests. Whether the contract was divisible is a question of law dependent upon the terms of the contract. What those terms were is a question of fact dependent upon the evidence.

On the latter question, it must be remembered in this case as in all others that, in passing upon the sufficiency of evidence, whether challenged by motion for a nonsuit or by motion for judgment *non obstante veredicto*, it is only when the court can say, as a matter of law, that there is neither evidence nor reasonable inference from evidence to sustain the verdict that either of such motions can be granted. *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4; *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166. In the case here, there was evidence that appellant agreed to pay a commission on any sale or exchange of his property which respondent might secure, whether of the stock alone, the real property alone, or of stock and real property together. Re-

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spondent so testified and we find little evidence to the contrary. It was for the jury to say whether in fact such was the agreement.

Was this contract divisible? If the several stipulations of a single contract are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the contract as a whole, and any part of the contract is subject to the ban of the statute of frauds, then no recovery can be had upon any part of it. But if the several stipulations are not so interdependent but that a distinct engagement as to any one stipulation may be fairly and reasonably extracted from the whole, then there may be a recovery on such distinct engagement whenever it is clear of the statute of frauds, though the other stipulations be subject to the ban of the statute. Browne, *Statute of Frauds* (5th ed.), §§ 140, 143. In the following cases involving the statute of frauds this distinction is exemplified and applied: *Jenkins v. Williams*, 16 Gray 158; *Stansell v. Leavitt*, 51 Mich. 536, 16 N. W. 892; *Rees v. Jutte*, 153 Pa. St. 56, 25 Atl. 998; *Rand v. Mather*, 11 Cush. 1, 59 Am. Dec. 131; *Mobile Marine Dock & Mut. Ins. Co. v. McMillan & Son*, 31 Ala. 711; *Lowman v. Sheets*, 124 Ind. 416, 24 N. E. 351, 7 L. R. A. 784; *Southwell v. Beezley*, 5 Ore. 458.

Judged by this rule, it seems to us that the contract here involved was severable. There was nothing in the agreement as proved making the right to a commission for the sale or exchange of the stock dependent upon the sale or exchange of the real estate. Nor was there anything making that right dependent upon the stock being sold or exchanged separately from the real estate. The promise was as specific to pay a commission for the sale or exchange of the one as of the other, and that, too, whether sold or exchanged separately or in conjunction. It seems clear, therefore, that if in the exchange as finally consummated the stock was put in at a

definite value, that value furnished a sufficient basis for determining the separate commission to be paid upon the exchange of the stock. On this question of the value at which the stock was traded, appellants urge that the written contract of exchange was conclusive and that, inasmuch as it fixed no separate value on any of the properties, no commission can be recovered in any event. But respondent, being a stranger to that contract, was not so bound by it that he could not prove the value at which the stock was estimated in the trade. He was not suing on that contract as one made for his benefit nor claiming any right originating in the relation created by it. Parol evidence was therefore admissible to establish the facts. *Ransom v. Wickstrom & Co.*, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A 588; 3 Jones, Commentaries on Evidence, p. 217, § 449; Browne, Parol Evidence, p. 31, § 28. See, also, *Union Machinery & Supply Co. v. Darnell*, 89 Wash. 226, 154 Pac. 183. The evidence adduced, though in conflict, tended to show that the mill stock was put in at \$45,000 and the oil stock at \$15,000. It was sufficient to take this question to the jury.

The original contract for commissions as proved was silent as to the rate of commission to be paid. It was therefore implied that the rate should be such as was usually and customarily paid at Spokane, Washington, for an exchange or sale of such stocks. The trial court properly so instructed the jury. The evidence showed that this stock was not listed on the Spokane stock exchange, and that the commission usually paid on unlisted industrial stocks was from eight to ten per cent, and on unlisted mining stocks from ten to twenty per cent. The jury evidently computed the commissions in this case at a lower rate than any of these, but of this the appellants cannot complain, since the evidence would have justified a higher recovery than that awarded. We find no sufficient reason for disturbing the verdict for insufficiency of evidence.

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The judgment is broad enough in its terms to be construed as a personal judgment against Ella Hupp individually. In this it is erroneous. The contract was made with Fred R. Hupp, and the judgment can only bind his property and that of the community. This, however, does not necessitate a reversal of the judgment. The judgment should be so modified as to run against Fred R. Hupp and the community consisting of Fred R. Hupp and Ella Hupp.

It is also urged that the attachment should not have been carried into the judgment because it ran against both Fred R. Hupp and Ella Hupp. So far as the record shows, the attachment was levied upon community property alone. It was not necessary, therefore, to name the wife as a party to the attachment at all. It only binds the property upon which it was levied, in any event. The record fails to show that any motion was made to dissolve the attachment for the reason now urged or for any other reason. It is too late to seek its dissolution now. We find no error in carrying the attachment into the judgment.

It is insisted that the court erred in opening the case and permitting the respondent to prove the community character of the stock after the evidence had been closed. This was a matter resting within the discretion of the trial court. We cannot say that the discretion was abused.

Finally, it is urged that the court erred in refusing to permit appellants to introduce further testimony as to whether or not this stock was community property. The offer was "to show the actual fact whether it is community property or separate property." There was no offer of any specific evidence nor any statement as to what the witness would testify to. There is nothing to show that, had the witness been permitted to testify, his testimony would not have been merely corroborative of that already adduced. The offer of evidence was wholly insufficient to make a predicate for error in its rejection.

The judgment is affirmed as against Fred R. Hupp and the community consisting of Fred R. Hupp and Ella Hupp. The court is directed to modify the judgment accordingly. Appellant Ella Hupp may recover her costs.

MORRIS, C. J., CHADWICK, FULLERTON, and MOUNT, JJ., concur.

[No. 13495. Department One. November 17, 1916.]

ORA VAN TASSEL, *Respondent*, v. THOMAS McGRAIL *et al.*,
Appellants.¹

BILLS AND NOTES—LIABILITY—DEFENSES—COLLATERAL AGREEMENT —“UNQUALIFIED PROMISE.” A promissory note, containing an absolute and unconditional promise to pay a fixed sum upon a day certain, cannot be qualified by affixing a collateral agreement that the same was to be paid only by the sale of lots and the application of the proceeds of the sales.

SAME. In such a case, though the two writings be construed together as one instrument, it is an absolute promise to pay, negotiable in character, within the meaning of Rem. 1915 Code, § 3394, declaring that an unqualified order or promise to pay is unconditional though coupled with an indication of a particular fund out of which the reimbursement is to be made; hence the condition is at best merely a privilege available as a defense only upon misapplication of available proceeds.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered December 27, 1915, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

Dysart & Ellsbury and *C. D. Cunningham*, for appellants.

W. H. Abel and *Coy Burnett*, for respondent.

CHADWICK, J.—Plaintiff and his wife were the owners of certain property in the state of Oregon which was deemed valuable for townsite purposes. Plaintiff, being unable to finance his endeavor, solicited the aid of the defendants. A

¹Reported in 160 Pac. 1053.

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Opinion Per CHADWICK, J.

corporation was formed. The land was conveyed to the corporation at a valuation of \$12,000. Stock was issued to all the parties in proportion to their interests. At the time the corporation was organized, defendants subscribed for stock to the extent of \$6,000. They paid in \$3,000 in money. To meet their subscription, and to balance the stock issue, defendants executed the obligation following:

"On or before one year from date, without grace, for value received, we or either of us, promise to pay to the order of the Vanora Townsite Company, a corporation, three thousand (\$3,000) dollars, with interest from date at the rate of six per cent per annum, until paid.

Thos. McGrail,
"John P. Symons,
"S. A. Agnew."

Upon the same sheet of paper, the parties wrote and subscribed to the following:

"It is herein provided and agreed that the above note is to be paid from the proceeds obtained from the sale of lots in the town of Vanora, Crook county, Oregon, and that one-fourth ($\frac{1}{4}$) of the proceeds of all sales of lots in said town of Vanora are to be applied to the payment of said note and interest and until the same is paid.

Thos. McGrail,
"John P. Symons,
"S. A. Agnew.
"Vanora Townsite Company,
"By: Thos. McGrail."

The note was thereafter indorsed over to plaintiff.

As lots were sold, payments were applied on the note as provided in the collateral contract. There is also a payment of \$1,000, the source and legal effect of which is controverted, but as we now view the law of the case, it is not material. The townsite venture was a failure, the unsold property being sold under a mortgage foreclosure proceeding. The court below made findings in favor of plaintiff, and entered judgment against defendants in the sum of \$2,061.70. Defendants have appealed.

The complaint is in ordinary form. Two defenses are set up; that respondent took the note with full knowledge of the collateral agreement, and that the action is premature.

That a collateral oral agreement limiting the liability of the maker of an unqualified promise to pay, or fixing a collateral source of payment, is not available as a defense is now well settled by our own decisions. *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977; *Bryan v. Duff*, 12 Wash. 233, 40 Pac. 936, 50 Am. St. 889; *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751; *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941; *First National Life Assurance Society of America v. Farquhar*, 75 Wash. 667, 135 Pac. 619; *Post v. Tamm*, 91 Wash. 504, 158 Pac. 91.

In the *Anderson* case, we said:

"It has been repeatedly held by this court that, in the absence of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability. He is bound by the terms of his obligation."

It is also settled by our own expressions that, where an unqualified written promise to pay in money is accompanied by a writing which conflicts or lends ambiguity to the promise, the unqualified promise will control. This principle was announced in *Lovell v. Musselman*, 81 Wash. 477, 142 Pac. 1143, where we said:

"The note is an absolute and unconditional promise to pay a fixed sum of money upon a day certain. . . . The law is that if a note and mortgage contain conflicting provisions, the note will govern as being the principal obligation."

See, also, *Tacoma Mill Co. v. Sherwood*, *supra*.

While there is some conflict in the authorities, of which appellants avail themselves, we understand the greater weight of authority, upon a like state of facts, is consistent with the rule we have heretofore declared.

But if we grant the merit of appellants' contention that the two writings are to be construed together as one instru-

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ment, they are in no better position. The result is the same. We need look no further than the statute. The writing is an absolute promise to pay, negotiable in character. The statute follows :

"An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with :

"(1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount;" . . . Rem. 1915 Code, § 3394.

The best that appellants could hope for is a holding that the parties fixed a source of payment other than their personal obligation. But if it were so held, it would not be a defense for, as is shown by competent testimony and admitted by appellants, the source out of which they expected the note to be paid has failed. The agreement that the note "is to be paid from the proceeds obtained from the sale of lots in the town of Vanora," is, at best, a privilege available only as a defense in the event that respondent had in fact sold lots sufficient to satisfy the note and had not accounted therefor. There being neither pleading nor testimony to sustain this theory, it follows that appellants are bound by their promise, unqualified by the collateral agreement fixing a source of payment.

The legal meaning of the collateral agreement is no more than that the note is to be paid *pro tanto* as funds become available out of the proceeds of the sale of lots. If there are no proceeds, the promise to pay remains.

Affirmed.

MORRIS, C. J., MAIN, ELLIS, and PARKER, JJ., concur.

[No. 13658. Department One. November 17, 1916.]

FRANK GROUNDWATER, *Respondent*, v. JOHN H. TOWN,
Appellant.¹

PROCESS—PRIVILEGE—NONRESIDENTS—ATTENDANCE AT COURT—REASONABLE TIME. Immunity of a nonresident from the service of summons, claimed by him on the ground that he was temporarily in this state for the purpose of attending upon, and redeeming property from, an execution sale, is not established where it appears that no redemption was made while he was in the state, and that he spent twenty-four days in the state arranging a trade of his property and remained in the state at least twenty-four hours after his business was concluded before starting to return; since more than a reasonable time elapsed without offering excusatory facts or circumstances.

Appeal from a judgment of the superior court for Grays Harbor county, Irwin, J., entered January 15, 1916, in favor of the plaintiff, upon overruling a motion to quash the service of summons, in an action on a promissory note. Affirmed.

John M. Gleeson and *A. G. Gray*, for appellant.

A. M. Abel, for respondent.

ELLIS, J.—This action was brought upon a promissory note for \$1,660, in the superior court of the state of Washington for Chehalis, now Grays Harbor, county, where plaintiff resides. The note was executed by defendant, who is a resident of the state of Montana. The summons and complaint were served upon defendant personally on March 26, 1915, at Spokane, Washington, while he was temporarily in this state. He appeared specially and moved to quash the service. The affidavits in support of his motion stated, in substance, that, at the time of service, he was in this state for the purpose of "settling and disposing of" an action in the superior court of the state of Washington for King county in which he was a defendant; that, in 1914, that

¹Reported in 160 Pac. 1055.

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Opinion Per ELLIS, J.

action was commenced to foreclose a mortgage upon certain lands owned by him in that county, and resulted in a sheriff's sale of the land under a decree of that court; that, on March 2, 1915, he came from his home in the state of Montana to Seattle, Washington, for the purpose of making redemption from that sale and for the purpose of advising with his counsel and, if necessary, for the purpose of testifying before the sheriff of King county or in the superior court for King county in making such redemption; that he finally succeeded in making such redemption, paying part of the sum necessary in cash and part by a trade, and was thereby relieved from the necessity of testifying either before the sheriff or in court; that he immediately left King county and started for his home in Montana, and while in transit at the depot in Spokane on March 26, 1915, the attempted service was made upon him. His answers to interrogatories propounded by plaintiff, however, disclose the fact that he employed no counsel, gave no notice of redemption, did not appear before the sheriff or the court, did not in fact redeem the land from the sheriff's sale, and that what he calls redemption was in fact an exchange with one Peavey of his right of redemption and \$2,000 in money for certain lands in Montana owned by Peavey. The deed from defendant to Peavey was acknowledged on March 22 and was delivered to Peavey on March 23, 1915. The deed of the Montana lands from Peavey to defendant was acknowledged March 19 and was delivered to the defendant on the afternoon of March 24, 1915. Defendant did not leave Seattle until the next day between eight and nine o'clock in the evening. There is no showing that the King county land was ever by any one redeemed from the foreclosure sale. On the contrary, plaintiff produced an affidavit of the deputy clerk of King county to the effect that the sheriff's sale of that land was made on March 30, 1914, that the sale was confirmed on April 18, 1914, and that up to May 27, 1915, the date of the affidavit, no proceeding to re-

deem had ever been returned to the superior court of King county in the case in question.

Upon this showing the trial court overruled the motion to quash. Defendant refused to plead further, and judgment upon the note was entered against him. Still preserving his special appearance, he prosecutes this appeal.

We shall assume, without so deciding, that a suitor or a witness from another state is entitled to immunity from service of process while in attendance upon court in this state and for a reasonable time in coming from and returning to the state of his domicile. This court has never so decided, but decisions from many other jurisdictions so holding have been cited. We shall also assume, without so deciding, that a proceeding to redeem from a sale on execution pursuant to § 599 of Rem. 1915 Code, is such a proceeding as to entitle a nonresident redemptioner to immunity under the assumed general rule while actually engaged in redeeming and for a reasonable time in coming from and returning to the state of his domicile, though no decision from any jurisdiction so holding has been cited. We shall further assume, without so deciding, that the supposed immunity of a nonresident redemptioner would cover all of the time necessary to give notice of his intention to redeem, as well as the actual time necessary to make the redemption. The statute, § 599 *supra*, requires five days' notice.

But even assuming all of these things, appellant's showing falls far short of entitling him to the immunity which he claims. He gave no notice of an intention to redeem, he instituted no proceeding to redeem, he employed no counsel, he did not redeem. It affirmatively appears that, at least during the time he was in this state, there was no redemption by any one. Apparently he abandoned that purpose and spent some twenty-four days in this state arranging a trade of his equity of redemption in the King county lands for lands in Montana. His showing no more entitles him to an immunity from service of process than if he had employed his time while

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in this state in negotiating for the sale of any other property or property rights which he might have possessed. Had he been prepared to redeem when he came into this state, it is obvious that he could have accomplished that purpose, including the time necessary for giving the notice, within six or seven days at the outside. He made no showing that there was any obstruction, either actual or anticipated, by any one to the exercise of his right to redeem, or that that right was ever questioned. He made no showing that, for this or any other reason, he was delayed in the exercise of that right. For the purpose of this decision, we have assumed the law to be more broadly in appellant's favor than it has been declared by any court to which our attention has been called, but we cannot assume facts which he has wholly failed to show. Moreover, even if we assume that his trade was a redemption, he remained in this state for a day after the trade was consummated and the deeds exchanged. His own showing indicates that the regular train from Seattle to Spokane left Seattle between eight and nine o'clock in the evening. No excuse is given or suggested why he did not take that train on the evening of March 24 instead of waiting until the evening of the following day. Even indulging his own theory, he was in this state for at least one whole day longer than was reasonably necessary, or necessary at all, to the accomplishment of the purpose which he invokes as the sole ground of immunity. It is universally held that what is a reasonable time is a question of fact dependent upon the circumstances of the given case. Appellant has admitted the delay but has offered no excusatory facts or circumstances. The purpose of the rule of immunity wherever it prevails is to prevent obstructions to the administration of justice. It should not be so extended and perverted as in itself to be available as an obstruction to justice.

The judgment is affirmed.

MORRIS, C. J., MAIN, PARKER, and CHADWICK, JJ., concur.

[No. 13290. Department Two. November 18, 1916.]

C. L. COLBURN, *Appellant*, v. C. J. WINCHELL, *Respondent*.¹

WATERS AND WATER COURSES—APPROPRIATION—RIGHTS—POWER OF STATE. The United States government having by acts of Congress waived its right to waters flowing within the boundaries of any state, the state had a right in 1899, by Rem. 1915 Code, § 6333, to authorize the appropriation of waters for irrigation purposes, as an impairment, by reason of necessity, of the common law right to the undiminished flow of a stream in its natural channel.

SAME—PUBLIC LANDS—VESTED RIGHTS—SUBSEQUENT GRANT TO STATE. An appropriation of water for irrigation having been made in 1903, under the authority of the act of 1890 while the title to the lands was in the Federal government, the state, in subsequently taking title for the purposes of a scientific school, takes the same subject to the previous vested right.

SAME—NOTICE OF APPROPRIATION—SUFFICIENCY. A notice of appropriation of water for irrigation will not be held defective, where no specific failure to comply with the law is pointed out, though evidence of the notice of posting may be meager.

SAME—APPROPRIATION—REQUISITES. In appropriating water for irrigation, there must be an intention to appropriate a certain quantity, and the actual use thereof or the exercise of reasonable diligence in preparing the land therefor.

SAME—APPROPRIATION—RIGHT OF WAY—STATUTES. The act of 1907, Rem. 1915 Code, § 6844, respecting the right to construct ditches over the land of the state in aid of irrigation has no application to a ditch already constructed for waters appropriated before the passage of the act.

SAME. Where an irrigation ditch for appropriated water was constructed across land before the title passed out of the Federal government, a right of way therefor was acquired under Federal Statutes Annotated, vol. 7, p. 1090.

Cross-appeals from a judgment of the superior court for Klickitat county, Back, J., entered September 20, 1915, in favor of the defendant, in an action for an injunction and for damages, tried to the court. Affirmed.

George F. Felts and *I. N. Smith*, for appellant.

Brooks & Brooks, for respondent.

¹Reported in 160 Pac. 1052.

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Opinion Per MAIN, J.

MAIN, J.—The parties to this action are two rival claimants to the water of a nonnavigable stream, known as Old Logging Camp creek. The trial resulted in a judgment giving one-half of the water to each of the parties. From this judgment, both have appealed.

The facts are these: During the year 1903, the plaintiff's predecessor in interest, being the owner of the northwest quarter of section 13, twp. 4 N., R. 10 E., W. M., went upon the southeast quarter of section 11, in the same township, dammed the creek, constructed a head gate or intake, and diverted the water therefrom. This water was carried to the property now owned by the plaintiff by means of a ditch and flume, where it was used for irrigation. At the time the diversion was made, the southeast quarter of section 11 was government land. During the year 1905, this quarter, together with other lands, was granted to the state of Washington for the establishment and maintenance of a scientific school. The application by the state was made March 5, 1904. In 1906, the one hundred and sixty acres mentioned was sold by the state to the defendant. This controversy arose in 1911, when the defendant refused longer to permit the plaintiff to take water from the stream.

It is claimed that, since the land was granted to the state for the purpose of a scientific school, no right of appropriation exists under the provisions of the enabling act. This question, however, is not necessarily involved in the case and, therefore, no opinion will be expressed upon it.

The right to appropriate water for irrigation purposes arose out of the doctrine of necessity, for without such right, arid lands could not be made valuable. The right of appropriation is an impairment of the common law doctrine that the water of a stream must continue to flow in its natural channel, undiminished in quantity and unimpaired in quality. The right to appropriate water for irrigation purposes has been recognized by the acts of Congress, and by the statutes of a number of states.

The legislature of this state, during the session of 1890, passed an act authorizing any person who owns or has possessory rights in lands in the vicinity of any natural stream or lake, not abutting on such stream or lake, to take water therefrom, if there be any surplus of unappropriated water in such lake or stream. Rem. 1915 Code, § 6333.

In speaking of the act of Congress relative to the right to appropriate water for irrigation purposes, Mr. McKinney, in his work on Irrigation and Water Rights, vol. 1 (2d ed.), p. 1026, remarks:

“As far as the United States government is concerned by those various acts of Congress, fully discussed in future portions of this work, it has waived its rights as sovereign in and to the government and control of the waters flowing or standing within the boundaries of any state, and has conferred the jurisdiction of such waters upon such state.”

The state, then, when it passed the act of 1890, had the right to authorize the appropriation. Under this authority, the appropriation was made during the year 1903. At this time the title to the land now owned by the defendant had not passed out of the Federal government. The application for it had not then been filed by the state. The making of the appropriation was authorized by the state and permitted by the acts of Congress. The appropriation being made under such authority, when the state received the grant of the land in section 11 for the purposes of a scientific school, it would necessarily take it subject to any previous vested right.

Some claim is made that the paper appropriation was defective. But no requirement of the statute in this regard with which the notice fails to comply is pointed out. The notice meets the requirements of the statute. While the legal evidence as to the posting of the notice as required by the statute is somewhat meager, yet we think it sufficiently appears that the plaintiff's right or title to one-half of the water in the creek is not defective for this reason. There was no evidence which would indicate that the notice had not been

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posted. The circumstances, so far as they bear upon the question, indicate a posting.

The next point is whether the trial court correctly found the amount of water which the plaintiff was entitled to under his appropriation. In order to make an appropriation, there must be an intention to appropriate a certain quantity of water and the actual use of this quantity or the exercise of reasonable diligence in preparing the land for its use. *Sander v. Bull*, 76 Wash. 1, 135 Pac. 489. Without reviewing the testimony, but after having given careful consideration to the same, we are of the opinion that the judgment of the trial court in giving to the plaintiff one-half of the water of the stream is sustained by the evidence.

There is some discussion in the briefs over the question whether the plaintiff had a right of way for the ditch through which the water was conducted. In support of the claim of the right to construct a ditch over state land, our attention is called to Rem. 1915 Code, § 6844. The act of which that section is a part recognizes the right to construct a ditch over the land of the state in aid of irrigation, and defines the necessary procedure. But that act was passed during the year 1907, and has no application to the facts in this case, because, as already stated, the title to section 11 passed out of the state during the year 1906, and before the act was passed. The ditch having been constructed across section 11 before the title thereto passed out of the Federal government, a right of way therefor was acquired under § 2339, Federal Statutes Annotated, vol. 7, p. 1090.

Upon this appeal neither party will recover costs. The judgment is affirmed.

MORRIS, C. J., HOLCOMB, and PARKER, JJ., concur.

[No. 13346. Department Two. November 18, 1916.]

R. W. WALLACE, *Respondent*, v. F. B. BABCOCK *et al.*,
Appellants.¹

EVIDENCE—PAROL TO VARY WRITING—WAIVER OF LEGAL TENDER. A waiver of legal tender of the contract price to be paid for wheat affects only the mode of payment and hence is not inadmissible as varying the terms of the written contract.

TENDER—WAIVER—EVIDENCE—SUFFICIENCY. A waiver of legal tender of the contract price for wheat is sufficiently shown by failure to reply to a letter that the buyer would pay by his check, taken in connection with other circumstances.

APPEAL—HARMLESS ERROR—TRIAL—MISCONDUCT OF COUNSEL. Error cannot be predicated upon an improper remark of counsel in argument, where on objection the jury was admonished that it was improper and to disregard it.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered June 11, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Modified.

Giles C. Rush and *R. M. Webster*, for appellants.

Samuel P. Weaver, for respondent.

MORRIS, C. J.—Action for damages for breach of contract. Defendants answered and, by affirmative defense, set up a counterclaim. The cause was tried to a jury, and a verdict rendered in favor of plaintiff. Defendants appeal from a judgment entered upon the verdict.

In July, 1914, appellants desired to sell 10,000 bushels of wheat. Respondent made an offer of 67 $\frac{1}{4}$ cents a bushel, which offer was accepted, and on July 14th, respondent sent appellants a contract of sale. The letter enclosing this contract concluded with the following sentence:

“When you get your warehouse receipts for this wheat mail them to me and I will send you check to cover.”

¹Reported in 160 Pac. 1041.

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Opinion Per MORRIS, C. J.

Appellant acknowledged receipt of this letter, but made no mention in his answer of the sentence quoted. Thereafter, the contract of sale was executed. There was no further mention of payment between the parties, and on September 28th, appellant wrote respondent as follows:

“Will be in Ewan 3 or 4 o'clock Sept. 30, at Mr. Rush's house. You can have knowledge of the grain by that time.”

Mr. Rush was appellants' attorney. Respondent testified that he received this letter on September 30th, the day payment and delivery were to be made in accordance with the terms of the contract. The parties met at Ewan and proceeded to the home of Mr. Rush. They discussed the amount to be paid for the wheat and other matters, and finally agreed upon the amount to be paid. Respondent offered his check in payment, which appellant refused to accept, saying that he preferred gold coin. Respondent then left the office and returned a little later with a person whom he desired to witness a tender. The check was again offered and refused. Respondent offered to procure a certified check, which was also refused. He then proposed to take appellant to Lamont, where a bank is located, obtain the money and bring him back, but appellant refused to go.

It is first contended that the court erred in admitting evidence to show that appellants had waived their right to demand a money tender from respondent, on the ground that such evidence varied the terms of the written contract. The only effect of the admission of this evidence was to show a waiver by appellants of a legal tender. It neither impeached nor destroyed the written instrument nor any of its terms. As this evidence only went to the manner of payment, it was clearly admissible under the rule announced in *Johnston v. McCart*, 24 Wash. 19, 63 Pac. 1121, where it was held that an oral agreement, affecting only the manner of payment under a written contract, was admissible and not within the objection that it varied the terms of a written instrument.

The next contention is that the evidence failed to show a waiver of legal tender. In view of the facts we have heretofore recited, we believe the jury was justified in so finding. While appellants' failure to reply to respondent's statement in the letter that he would tender his check may not of itself have been sufficient to show a waiver, yet, taken in connection with other circumstances, it was sufficient to make the question one for the jury. The instructions of the trial court upon this point were full and complete, and not excepted to. We cannot substitute our judgment for that of the jury where there is evidence to sustain the verdict.

Misconduct of counsel is predicated upon a statement made to the jury by counsel for respondent as to the advance in the price of wheat subsequent to the time delivery was demanded. Objection was made to this line of argument, and the court admonished counsel that it was improper and instructed the jury to disregard it. Under these circumstances, we cannot find prejudicial error.

Appellants contend that it is admitted by respondent in his testimony that there was between ten and twenty dollars due them upon their counterclaim. No denial of this is made in respondent's brief, and upon an examination of the statement of facts, we find that the contention must be sustained.

Upon examination of other points argued in the briefs we find them to be without prejudicial error.

The lower court is hereby instructed to reduce the judgment entered by deducting the sum of \$20, which is admittedly due appellants. As so modified, the judgment will be affirmed. Respondent will recover costs on appeal.

HOLCOMB, MAIN, and PARKER, JJ., concur.

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Opinion Per MAIN, J.

[No. 13103. Department Two. November 22, 1916.]

**MICHAEL J. REYNOLDS, Respondent, v. HARRY L. DAY et al.,
Appellants.¹**

RELEASE—VALIDITY—FRAUD — EVIDENCE — SUFFICIENCY. To overcome a release of damages, fraud, false representations or overreaching must be established by clear and convincing testimony; and the evidence is insufficient, where it appears that an intelligent miner, who had had some schooling, and knew the company owed him nothing, signed a release which was read over to him, and accepted money which he knew the company would be paying only in settlement of any claim he might have for damages, and his claim that he could not understand the meaning of such words as "injury," "liability" and "settlement" and that he thought he was receiving "wages" is not substantiated by the record.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered June 8, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a mine. Reversed.

John H. Wourms, Plummer & Lavin, and Graves, Kizer & Graves, for appellants.

Robertson & Müller and Corkery & Corkery, for respondent.

MAIN, J.—The purpose of this action was to recover damages for personal injuries.

One of the defenses pleaded in the answer was a settlement and written release. The signing of the release is not controverted, but it is claimed that it was induced by fraud. The trial resulted in a verdict and judgment for the plaintiff. From this judgment, the appeal is prosecuted.

The facts which present the controlling question are these: On August 10, 1912, the respondent, while working for the defendants in the mine owned and operated by them at Burke, Idaho, sustained a serious injury to his feet and ankles by

¹Reported in 161 Pac. 62.

falling down a chute in the mine. At this time, the respondent had been at work in the mine about two weeks. After the accident, he was taken to a hospital at Wallace, Idaho, which was conducted by Dr. M. T. Smith. The respondent remained in the hospital approximately twelve weeks. The mine was operated under the name of the Hercules Mining Company, with offices in Wallace.

After the respondent had been in the hospital about ten weeks, and was able to leave the hospital and go about town on crutches, he went to the office of the manager of the company, and while there, discussed with the manager his injury, and the question as to who was liable therefor. He took the position that the company was to blame, and the manager took the opposite position. After talking with the manager for a time, he left the office and returned on October 21, 1912, when again he and the manager discussed the same questions as on the previous visit. On this date an agreement was entered into as follows:

"This agreement between John Reynolds, party of the first part, and the Hercules Mining Company, party of the second part, recites the following condition:

"Whereas, John Reynolds was injured in the Hercules mine by falling down a chute in the said mine, and whereas there is no blame or negligence attached to said company for this injury; the said company as a matter of grace gives John Reynolds time from the tenth day of August to the present date inclusive at the rate of (\$3.50) three dollars and fifty cents per day, paid to him in hand this 21st day of October.

"The above named company further agrees to allow the above named John Reynolds three (3) months' wages at the rate of (\$3.50) per day payable at the Hercules Mining Company's office, Burke, Idaho, on the tenth of each month thereafter. At the end of this time John Reynolds is to report for work, if he is unable to work at that time the company will allow him two months' additional wages at the above named rate (\$3.50) three dollars and fifty cents per day.

"For this consideration, the said John Reynolds has accepted this amount in full settlement for any claims of per-

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sonal injury, which he might have upon the above named company.

John Reynolds.

"C. C. Richlie, Witness."

On the same date he was given a check for \$255.50, and signed the following voucher:

"Burke, Idaho, October 21, 1912.

"Hercules Mining Co., Dr.

"Check No. 961

To John Reynolds,

"1912.

Burke, Idaho.

To Settlement—for injury to—(John Reynolds)

in Hercules Mine, Burke, Idaho, i. e.—

Time as follows:

August 22 days at \$3.50 per day.. \$77.00

September 30 days at \$3.50..... 105.00

October 21 days at \$3.50..... 73.50 255.50

\$255.50

Wallace, Idaho, Oct. 21, 1912.

Approved:

Received payment in full for above

[Signature illegible.] amount.

Gen'l. Manager.

John Reynolds."

On November 1, 1912, the respondent again appeared at the office of the company and requested the manager to advance him sixty days' wages. The respondent desired this money so that he might make a trip east and consult Mayo Brothers, at Rochester, Minnesota, relative to his feet. At this time a memorandum was signed by the respondent which referred to "the former agreement between the Hercules Mining Company and myself," and acknowledged receipt of sixty days' wages before the same would be due under the release signed on the 21st of October. On the same date, the respondent signed a voucher like the one above set out, which stated: "To settlement for injury: 60 days at 3.50 per day, \$210." A check for this sum was then given him.

After receiving this check, the trip to see Mayo Brothers was made. Some time after January 1, 1913, the respondent returned to Wallace. On January 29, 1913, he received from the company a check for \$105 and signed a voucher which stated: "To December wages—30 days at \$3.50.

Amount allowed account injury received in Hercules mine, \$105."

Some time after this, and probably during the early part of March, the respondent went to Spokane to consult Dr. C. F. Eikenbary. Not at that time having money to bear the expense of the trip, Dr. Smith advanced him \$50, after consulting with the manager of the company and being assured that the company would pay the same. Dr. Eikenbary operated upon the respondent's feet, and was paid therefor by the company the sum of \$150. After so far recovering from the operation performed by Dr. Eikenbary as to be able to be about on crutches, the present action was instituted.

Since the case is controlled by the settlement and release, a statement of the facts bearing upon other phases of the controversy would be immaterial. After a statement of the law by which the validity of the release is to be determined, a further reference to the facts will be made.

Releases of this kind are like any other writing and are not to be lightly overcome. If they are not induced by fraud, false representations, or overreaching, they must be sustained. The testimony to sustain the charge of fraud must be clear and convincing. *Nath v. Oregon R. & Nav. Co.*, 72 Wash. 664, 131 Pac. 251; *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266, 140 Pac. 377; *Spratt v. Northern Pac. R. Co.*, 90 Wash. 592, 156 Pac. 563.

The respondent claims that, at the time he signed the release, he was told by the manager of the company that he would be well in two months, and that he thought he was simply receiving wages. He admits that he knew at this time that the company owed him nothing for wages, the amount which he had earned prior to the injury having been previously paid. He also admits that, for the money which was paid pursuant to the release, the company received no benefit. He also admits that, prior to the signing of the release, some paper was read to him, but says that he does not know whether it was the one he signed or not. The manager of the

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company and the stenographer both testified that the release was dictated in the respondent's presence, and was afterwards either read to him by the manager or that he read it himself before he signed it.

As to the vouchers which he signed, the respondent says that he did not read them, and that if he had, he would not have known the meaning of the word "settlement." He also testified that he would not have known the meaning of the word "injury," or "liability" as used in the release. He claims that, at this time, he was feeling much broken up, and that his head was "going around." The respondent had had some schooling; was able to write letters and read the replies which he received thereto from his relatives; and was able to read the newspapers to some extent, but did not understand the meaning of "big words." Although he testified that he was unable to understand such words as "injury," "liability," and "settlement," yet he was an unusually adroit witness. He speaks as correctly as the average witness, if not more so.

Some reference is made to the claim of the respondent that Dr. Smith told him he would be all right in two months. But whatever Dr. Smith may have said, he was not employed by the company, but by the men in the mine, and his statements would not be binding upon the company, even assuming that the statement of the physician, if relied upon, would be sufficient to impeach the release.

The respondent left his home in Ireland when fifteen years old, and went to Scotland, where he remained four years. Then he came to Philadelphia, and from there to Massachusetts, where he had a brother or brothers. After working in Massachusetts for a time, he went to Pennsylvania, where he worked in a mine. Subsequent to this, he worked in a number of different states at such work as mining, teaming, and carpentering. Before he went to see Dr. Eikenbary, as he says, Dr. Smith told him that he had signed a release. But as Dr. Smith testified, it was the respondent who told him that he had settled with the company. Whoever may be right

as to this, the fact is that, after this conversation, the respondent received the \$50 which Dr. Smith advanced after being authorized to do so by the company. Under the evidence, it cannot be found that the respondent thought he was receiving wages, because he admits that he knew no wages were due him. It cannot be said, at least when he received the payment on January 29th, that he relied upon the assurances of the manager of the company—assuming that he had a right to rely upon such assurances that he would be well in two months—because at this time much more than two months had elapsed, and he had been back to see Mayo Brothers, and had received some treatment from them, and knew that his injury to some extent was permanent. The only reason the company would be paying him this money was in settlement of any claim he might have for damages. And this fact must have been known to him.

Taking into consideration all the facts in the case as stated, as well as other details not stated, the only conclusion to be arrived at is that the evidence in this case by which fraud or overreaching is sought to be sustained, is far from clear and convincing. If, under the facts in this case, the release can be impeached, it is difficult to see how it would be possible for a release in any case to be sustained.

A number of cases from this court have been cited by the respondent. Without reviewing these in detail, it may be said that, after a careful reading of all of them, it appears that each of the cases relied on is clearly distinguishable in its facts from the present case. Where a release is sought to be impeached for fraud, every case must depend to a large extent upon its own facts.

The judgment will be reversed, and the cause remanded with direction to the superior court to dismiss the action.

MOUNT, HOLCOMB, and PARKER, JJ., concur.

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Statement of Case.

[No. 13355. Department Two. November 22, 1916.]

THE STATE OF WASHINGTON, *on the Relation of A. R. Titlow,*
Receiver etc., Appellant, v. THE CITY OF CENTRALIA
*et al., Respondents.*¹

ABATEMENT AND REVIVAL—ACTIONS IN DIFFERENT JURISDICTIONS—IN REM—IDENTITY OF ISSUES. Where a city commingled a local improvement fund with its general funds, deposited in a bank which failed, an action in the Federal court to establish a preferred claim by the city to the deposits cannot be pleaded in abatement of a subsequent action brought against the city by the receiver to compel the city to pay local improvement warrants out of the receiver's dividends, paid to the city on account of the deposits, where the Federal court recognized the right of the receiver to prosecute the second action and protected the parties in their rights by allowing the same right of set-off against that fund as would exist against the warrants, if any; since the same funds and questions are not involved in the two suits.

MANDAMUS—WARRANTS—PAYMENT. Mandamus is the proper remedy to compel a city to pay warrants where there are funds available for their payment and payment is refused.

TRUSTS—COMMINGLED FUNDS—WITHDRAWALS—MUNICIPAL CORPORATIONS—IMPROVEMENT FUND—LIABILITY. Where a city commingled a local improvement trust fund with its general funds deposited in a bank, and there remained continuously on deposit sufficient to meet warrants against the trust fund, the warrants are payable out of the commingled fund.

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT FUND—CITY TREASURER—LIABILITY OF SUCCESSOR. In mandamus against a city and its city treasurer to compel the payment of warrants, it is no defense that the present city treasurer is not the same person who held the office when the funds were received; as the office is continuous, regardless of the person who fills it.

Cross-appeals from a judgment of the superior court for Lewis county, Rice, J., entered July 26, 1915, upon findings favorable in part to both parties, in mandamus proceedings to require the payment of city warrants, tried to the court. Reversed on plaintiff's appeal; affirmed on defendant's appeal.

¹Reported in 161 Pac. 74.

Oldham & Goodale, for appellant.

William R. Lee, for respondents.

MAIN, J.—This is an action in mandamus to compel the defendant city and the treasurer thereof to pay certain local improvement bonds, coupons and warrants. The cause was tried to the court without a jury, and resulted in a judgment granting in part and denying in part the relief prayed for in the complaint. From this judgment, both parties have appealed.

The facts necessary to an understanding of the questions here for determination are these: There was in the city of Centralia a local improvement district known as District No. 32. The United States National Bank, of which the plaintiff is the receiver, held two warrants, numbers 89 and 82, drawn against the local improvement fund for this district. The money to pay these warrants was collected by the city on or about the 10th day of February, 1914. On the 14th day of February, 1914, the warrants were called. On the 21st day of September, 1914, the United States National Bank failed. This action is prosecuted by the plaintiff as receiver thereof. At the time the bank failed, the city had funds deposited therein to a greater sum than the amount of the two warrants mentioned. At or about the time this bank failed, the Union Loan & Trust Company also failed, in which bank the city also had funds deposited. When the local improvement money was paid to the city, it was kept separate upon the books of the treasurer, but in depositing it in the banks, it was commingled with the general funds of the city. On September 29, 1914, a demand was made for the payment of warrants 89 and 82, and was refused.

On or about the 19th day of January, 1915, the defendant city brought an action in the district court of the United States for the western district of Washington, southern division, seeking to establish a preferred claim to the moneys which it had on deposit in the United States National Bank

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at the time of its failure, and in the event that it did not prevail as a preferred claimant, that the warrants and bonds be offset against the amount of its general claim. On or about the 10th day of February, 1915, the present action was begun. A temporary restraining order was issued out of the Federal court restraining the receiver from prosecuting the action. On the 17th day of June, 1915, the restraining order was dissolved and the Federal court entered an order in which it was provided that, if, in the final determination of the cause in that court, or any court to which the cause might be appealed, it should be determined that the city of Centralia was not a preferred claimant, in that event, the same right of offset should exist as to the funds coming into the hands of the receiver in payment of the warrants as would exist had the warrants not been paid.

The moneys paid to the city treasurer from local improvement district No. 32 were deposited in the Union Loan & Trust Company. After the failure of that company, and prior to the trial of this action, the city had received dividends in about the sum of \$23,000, and also from bonding companies approximately the sum of \$20,000. When this sum was received it was apportioned by the city commission to various funds, principally to the light and water fund. No part of it was apportioned to the payment of the warrants for local improvement district No. 32. The trial court found, and the evidence sustains the finding, that, on the 14th day of February, 1914, and at all times thereafter, the city had on hand more than sufficient amount of money to pay warrants 89 and 82.

In this action the defendants, as an affirmative defense, pleaded in abatement the action in the Federal court. The first question is whether this plea should have been sustained. The rule is that, where the court in the progress of a suit properly pending before it, takes possession of property, its jurisdiction over the property for the time being becomes exclusive, and no other court can interfere with the possession

so acquired, and where, in the progress of the litigation, the court acquiring jurisdiction may be compelled to assume the possession and control of specific property, its jurisdiction is also exclusive. *Merritt v. American Steel-Barge Co.*, 79 Fed. 228.

In *Caine v. Seattle & Northern R. Co.*, 12 Wash. 596, 41 Pac. 904, it was held that an action *in rem* in the Federal court is not a bar to another action between the same parties for the same cause in the state court.

In *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A 767, it was held that an action in equity in the Federal court seeking an adjustment of funds as between creditors could not be pleaded in abatement in an action at law in the state court to recover a money judgment.

In *State ex rel. Scandinavian-American Bank of Seattle v. Tallman*, 29 Wash. 411, 69 Pac. 1115, the parties were rival claimants to a local improvement fund then in the city treasury. The surety company, which had completed the improvement when the contractor failed, began an action in the Federal court to restrain the city comptroller from paying the funds to any other person than the surety company. The defendant in that case claimed the fund, or a part of it, as assignee of the contractor. It was there held that the plea in abatement, setting up the proceedings in the Federal court, should be sustained, because "the court which adjudicates this controversy, should have the right to control this fund." That case, however, is distinguishable from the present case. Here the fund sought is in the city treasury. The litigation in the Federal court is over the funds in the hands of the receiver of the United States National Bank. If the city there prevails as a preferred claimant, the Federal court would have no concern relative to the warrants for which payment is here sought. The Federal court, in its order, recognized the right of the receiver to prosecute the present action, and protected the parties in their rights by allowing the same rights of set-off as against that fund as would exist against

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the warrants, if any. In the present action there is no plea of set-off. In the case last referred to, both parties were seeking the possession of the same fund, and in the progress of the litigation which had been brought in the Federal court, it would be necessary to assume the possession and control of the specific fund. We think the plea in abatement in this action cannot be sustained.

The next question is whether mandamus is the proper remedy to compel the payment of the warrants. The contention of the defendants is that the plaintiff's remedy, if any, was a suit sounding in tort for damages and not by proceeding in mandamus. The rule is that, where funds are in the city treasury available for the payment of certain warrants and payment thereof is refused, mandamus is the proper proceeding to compel the payment of such warrants; and, in such proceeding, there may be pleaded any defenses which will defeat the claimed right to the writ. *Cloud v. Sumas*, 9 Wash. 399, 37 Pac. 305; *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306; *Bacon v. Tacoma*, 19 Wash. 674, 54 Pac. 609.

In the case now before us, the fund was available for the payment of the warrants at the time the demand was made, because there remained continuously in the general fund sufficient money to pay the warrants, and the city, by commingling the local improvement fund with its general fund, made the general fund liable for the payment of the local improvement warrants. Section 28 of the local improvement act requires that all moneys collected by the treasurer for local assessments shall be kept as a separate fund, known as "Local Improvement Fund, District No. —," and shall be used for no other purpose than for the redemption of warrants and bonds drawn upon or against such fund. Laws of 1911, ch. 98, p. 459, § 28 (Rem. 1915 Code, § 7892-28).

In *State ex rel. American Freehold-Land Mortgage Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321, it was held that local improvement obligations "cannot be made a general charge

against the city." Reason and authority both sustain the proposition that the local improvement fund is a trust fund. *Weik v. Wausau*, 143 Wis. 645, 128 N. W. 429; *State ex rel. Scandinavian-American Bank of Seattle v. Tallman*, *supra*.

Where trust funds are commingled with other funds, and there remains continuously in such commingled fund an amount in cash equal to the amount of the trust fund, the trust obligations are payable out of the commingled fund. In *Carlson v. Kies*, 75 Wash. 171, 134 Pac. 808, 47 L. R. A. (N. S.) 317, it was said:

"The appellant suggests that the identical money was not traced into the hands of the receiver. That is true, but the old rule requiring an identification of the specific fund or its avails in the hands of a receiver has been relaxed in the later cases. The doctrine of the modern authorities, and what we consider the sounder view, is that the trust fund is recoverable where an equal amount in cash remained continuously in the bank until its suspension and passed to the receiver."

Applying the doctrine of that case to the facts in the present case, it follows that, since the city commingled the trust fund with its general fund, and there remained continuously in that fund sufficient to meet the warrants, the fund is available for their payment, and the writ of mandamus should issue.

Our attention has been called to a sentence in the findings of the trial court, wherein it is stated that there is not in "the city treasury now, funds applicable to the payment of warrants 89 and 82." While this sentence is embodied in the findings, it is only an expression of the opinion of the trial court as to whether the money then in the city treasury is applicable to the payment of the warrants. From what has already been said, it would appear that, upon this question we have reached a different conclusion from that of the trial court.

Some contention is also made that, since the present city treasurer is not the same person that held the office when the local improvement funds were received, such fund never came

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into his possession, and, consequently, the writ should not issue. Little need be said upon this question. The office of city treasurer is continuous, regardless of the person who may fill that office. The funds, as already shown, having been commingled, were available for the payment of the warrants. The commingled fund, sufficient to pay these warrants, was in the possession of the present city treasurer.

The judgment upon plaintiff's appeal will be reversed, and upon defendants' cross-appeal affirmed.

MORRIS, C. J., HOLCOMB, and PARKER, JJ., concur.

[No. 13410. Department Two. November 22, 1916.]

JOHN WALDY, *Respondent and Cross-Appellant*, v. THE CITY OF SEATTLE, *Appellant*, CEDAR LAKE LOGGING COMPANY, *Defendant*.¹

APPEAL—RECORD—EXHIBITS. Exhibits cannot be made a part of the record by being included in or attached to the clerk's transcript, but must be brought up by statement of facts or bill of exceptions.

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACT—AUTHORITY—ORDINANCE. An ordinance authorizing the board of public works to construct a railroad in accordance with plans and specifications to be prepared by the city engineer is broad enough to include authority to repair and reconstruct portions of the roadbed that had been damaged or destroyed by a thaw.

SAME—PUBLIC IMPROVEMENTS—CONTRACT—PERFORMANCE—EXTRA WORK—ACCEPTANCE—PRESUMPTION. In an action to recover for extra work on a city contract, the city cannot set up that the price therefor was not first agreed upon, as required by the contract, where the findings were silent on that subject and the presumption was that the city engineer had performed his duty in that respect; especially where the work was performed for a price fixed in the contract for extra work providing no price could be agreed upon in writing, and the work was accepted by the city.

SAME—"CLAIMS FOR DAMAGES"—FILING—ACTION ON CONTRACT. Where a contract for city work was entered into and performed, and the contractor sued for the balance due thereon, the action is on

¹Reported in 161 Pac. 65.

contract, and not for damages arising out of the breach thereof; hence a claim for damages is not a condition precedent to action under a charter provision requiring "all claims for damages" to be filed as therein provided.

SAME—PUBLIC IMPROVEMENT—CONTRACT—ASSIGNMENT—FINDINGS—SUFFICIENCY. Findings that an assignee of a city contract and the city engineer, who had control of the work, jointly hired plaintiff to perform the extra work required to complete the work, which was done at the price called for in the contract, are reasonably susceptible of the construction that plaintiff was assignee of the contract, and hence entitled to maintain an action against the city for the balance due him on the contract.

Cross-appeals from a judgment of the superior court for King county, Dykeman, J., entered November 20, 1915, upon findings in favor of the plaintiff as against one defendant, in an action on contract, tried to the court. Affirmed.

Hugh M. Caldwell and *James A. Dougan*, for appellant.

Vanderveer & Cummings and *H. McC. Billingsley*, for respondent.

MAIN, J.—This is an action upon a contract to recover for labor performed and material furnished to the defendant the city of Seattle. The trial resulted in a judgment for the sum of \$4,990.47 against the city, and a judgment of dismissal as to the other defendant, Cedar Lake Logging Company. From this judgment, the city appeals, and the plaintiff appeals from that portion of the judgment which dismisses the action against the logging company.

The case is here to be considered upon the findings of fact, conclusions of law, and judgment. No statement of facts or bill of exceptions has been filed. There appears attached to the back of the clerk's transcript certain exhibits which were introduced in evidence during the trial in the superior court. These are no part of the record. Without assembling the case, it may be stated that, under the repeated holdings of this court, exhibits are not made a part of the record by being included in, or attached to, the clerk's transcript, but

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must be brought here as a part of the statement of facts or bill of exceptions.

The facts as they appear in the findings, so far as here necessary to be set out, are, in substance, as follows: On February 13, 1912, the city of Seattle passed an ordinance, No. 28,898, authorizing and directing the board of public works to construct a railroad on the right of way belonging to the city from a connection with the existing municipal railway in Section 26, Township 23 north, Range 8 east, W. M. and the Chicago, Milwaukee & St. Paul Railroad to the site of the city masonry dam in King county. For this purpose, the ordinance appropriated the sum of \$50,000 to be used by the board of public works.

On February 20, 1912, the board of public works referred the ordinance to the city engineer, and instructed him to prepare plans and specifications for the construction of the railroad. Thereafter, and on the 8th day of March, 1912, the city engineer reported to the board of public works his plans and specifications which were, on that date, approved and adopted. On October 4, 1912, the city engineer was authorized and instructed by the board to construct a railroad according to the plans and specifications. The city engineer, in pursuance to this authority, commenced the construction of the railroad, and cleared, grubbed and partly graded the roadbed for the same. On March 18, 1913, the board of public works entered into a contract with the Northwest Lumber Company for the completion of the railroad by that company upon the roadbed prepared by the city engineer. Under this contract the lumber company was to surface the roadbed, lay the ties and rails, and do the ballasting. This work was to be done under the supervision, direction, and control of the city engineer. Thereafter, and apparently before any work had been done under the contract, it was assigned to the Cedar Lake Logging Company. This company commenced the construction of the railroad upon the roadbed as prepared by the city engineer.

In grading the roadbed, the city engineer had constructed the same upon frozen ground, and had made the fills and embankments by the use of frozen earth, ice, snow, brush, and other material unfit for a permanent roadbed. After the respondent and cross-appellant, who will be referred to as the respondent, as subcontractor for the Cedar Lake Logging Company, had laid a part of the ties and rails upon the roadbed, and had surfaced and ballasted the same, the roadbed began to sink and slide by reason of a thaw, and such portion of the track as the respondent had laid became, and was, in imminent danger of being lost and destroyed. The portion of the grade upon which ties and rails had not been laid likewise began to sink and slide, rendering it impossible for the work under the contract to be pursued.

According to the recital in the findings, the Cedar Lake Logging Company and the city of Seattle, through its city engineer, jointly and severally hired the respondent to perform the work of regrading the roadbed, and reballasting the track where necessary, and relaying the ties and rails, all under the direction and control of the city engineer. For this work, actual cost plus ten per cent for personal supervision thereof was to be allowed.

The contract under which the Cedar Lake Logging Company was to do the work recited that:

"In case any extra work is required for which a price has not been included in the contract for this improvement, the same shall not be begun until a price therefor shall have been agreed upon in writing, by the contractor and the city engineer. If for any reason the same extra work cannot be performed at an agreed upon price, it will be paid for at the actual cost of all labor and material required, together with ten per cent additional."

After the work which the respondent was required to do had been performed, he was paid on account thereof the sum of \$1,320.07. Further payment being refused, this action was brought to recover the balance, and resulted in the judgment above indicated.

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The appellant, in its brief, makes four points, distinctly and separately stated. These will be considered in the order in which they appear in the brief.

The first point is that, since the ordinance provided for the construction of the roadbed, the reconstruction made necessary by the thaw was not within the scope of the ordinance, and, therefore in making such reconstruction, it was done without authority of the city council. The ordinance provided that the board of public works "be, and it is, hereby authorized and directed to construct a railroad . . . in accordance with the plans to be prepared by the city engineer." Seattle Ordinance, No. 28,898, § 1.

It would be too narrow a construction to place upon this ordinance to hold that, after a portion of the work had been performed and, for any reason, was damaged or destroyed, there was no authority to repair or rebuild. If that construction were given to the ordinance, then, in case any portion of the work were damaged or destroyed before it could be repaired or reconstructed, it would be necessary to go back and have the city council pass another ordinance authorizing such repair or reconstruction. It seems plain that the ordinance should not be given this construction. If our construction of the ordinance be the proper one, the case of *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063, and other cases cited by the appellant are not applicable.

The second point is that the contract between the city and the Cedar Lake Logging Company provided a method by which the price of extra work was to be determined; and that because the findings do not recite that there was an attempt to agree upon the price of such extra work in writing, as the contract required, no recovery can be had. The findings being silent upon this question, it cannot be presumed that the city engineer failed in the performance of a duty enjoined upon him by the contract. Further than this, the work was performed for a price fixed in the contract for extra work, providing no price could be agreed upon in writing. The

work was accepted by the city. Under these facts, the city is hardly in a position now to urge the silence of the findings upon the attempt to agree in writing as a defense to an action for extras which were to be paid for in the manner specified in the contract if the attempt to agree in writing should be abortive.

The next point is that the action is for breach of contract and for damages arising out of the contract, and that as no claim was filed, as required by the city charter, the action must fail. The fallacy of this position is the assumption that the action is one for damages arising out of the contract, and not an action upon the contract. According to the facts found, a contract was entered into by which material was to be furnished and labor performed. Thereafter the contract was performed according to its terms. The action is upon the contract for the balance due thereon, and not for damages arising out of the breach thereof. In *International Contract Co. v. Seattle*, 74 Wash. 662, 194 Pac. 502, it was held that the provision of the city charter requiring "all claims for damages" to be filed as therein provided, included damages arising *ex contractu* as well as *ex delicto*. But it was not there held that in an action upon a contract it was necessary to file a claim for damages. The difference between an action upon a contract and a claim for damages arising out of a breach of contract is recognized in that case.

The fourth point is that the respondent's contract was with the Cedar Lake Logging Company, and not with the city of Seattle, and therefore no action can be maintained against the city. The findings do not present a very definite theory, yet it is fairly deducible therefrom that the respondent became, so far as the performance of the extra work was concerned, the assignee of the contract. Under his contract with the logging company, the respondent was to do all of the work which that company had contracted to do. When the extra work became necessary, the city engineer and the logging company cooperated in authorizing him to do such

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extra work. The work was performed at the exact price fixed in the contract for the payment for extras. If the facts show an assignment, the right to maintain the action is not denied. While some of the facts found would be opposed to the theory of an assignment, yet the findings are reasonably susceptible of a construction which would support that theory.

The presumption being in favor of the correctness of the judgment, the findings, if susceptible thereof, should be given such a reasonable construction as will sustain the judgment.

The judgment will be affirmed.

MORRIS, C. J., HOLCOMB, and PARKER, JJ., concur.

[No. 13474. Department Two. November 22, 1916.]

HANNAH BASSETT *et al.*, *Respondents*, v. THE CITY OF
SPOKANE, *Appellant*.¹

ADVERSE POSSESSION—PAYMENT OF TAXES—COLOR OF TITLE—STATUTES. The payment of taxes in good faith, by one claiming under a warranty deed from the owners in 1889, for seven consecutive years after title had passed by tax deed in 1903 to another, is a payment by a person having "color of title, made in good faith" within Rem. 1915 Code, § 789, providing that such payment shall vest title in vacant and unoccupied land to the extent and according to the purport of the paper title.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 3, 1916, upon findings in favor of the plaintiffs, in an action to quiet title, tried to the court. Affirmed.

H. M. Stephens, Ernest E. Sargeant, and Dale D. Drain,
for appellant.

R. L. Edmiston, for respondents.

MAIN, J.—The purpose of this action was to quiet title to a certain tract of land in the city of Spokane, Washington.

¹Reported in 161 Pac. 65.

From a judgment quieting the title as prayed for in the complaint, the defendant city appeals.

The controlling facts are these: On November 1, 1889, the respondents purchased the property and received from the then owner a conveyance by warranty deed. This deed was thereafter duly recorded. On March 8, 1902, a two-thirds interest in the property was sold by Spokane county for the nonpayment of taxes for the years 1893 and 1895. On March 19, 1903, a tax deed was issued to the county. On September 1, 1904, the county conveyed the two-thirds interest in the property acquired by it under the tax foreclosure proceedings to one J. F. McElroy. On May 26, 1913, McElroy and wife conveyed their interest in the property to the city of Spokane. The McElroys, during the time that they held title to the property, at no time paid any taxes thereon. The taxes, during this time, were paid by the respondents. In fact, from the year 1889, when the respondents purchased the property, down to and including the year 1914, they paid all the taxes assessed against the same, except for the years 1893 and 1894. The land was vacant and unoccupied. From these facts, it appears that the respondents, while the title to the property was in the McElroys, paid taxes thereon, in good faith, for more than seven successive years. There are a number of contentions advanced in the briefs, but the determination of one is decisive of this appeal. That question is: Did the respondents, while the title to the land was in the McElroys, have color of title by reason of their warranty deed from the owner?

Remington's 1915 Code, § 789, provides:

"Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. . . ."

As previously stated, the respondents paid taxes on the land, in good faith, for more than seven successive years,

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while the title was in the McElroys. Under the section of the statute quoted, this would give to the respondents title to the vacant and unoccupied land in controversy, provided the warranty deed, by which the title was conveyed to them, constitutes color of title. This question seems to be determined in *Jones v. Herrick*, 35 Wash. 434, 77 Pac. 798. In that case, it was held that an allegation in an affirmative defense in the answer that the defendant held under a warranty deed from the owner was equivalent to alleging that he held under color of title, and the pleading was good as against a demurrer. In this case, the facts show that the respondents held under a warranty deed from the former owner, and, therefore, under the holding in that case, they had color of title during the time that the title to the property was in the McElroys. This, with the payment of taxes, in good faith, for more than seven successive years, would operate to transfer the title from the McElroys back to the respondents, the land being vacant and unoccupied at all times. The respondents, having acquired title to the property by virtue of their color of title and the payment of taxes prior to the time that the McElroys conveyed the same to the city, their right was superior to that of the city, and the trial court properly adjudged that their title be quieted.

The judgment will be affirmed.

MORRIS, C. J., FULLERTON, and PARKER, JJ., concur.

[No. 13481. Department One. November 22, 1916.]

WILLIAM KILLES, *Respondent*, v. GREAT NORTHERN
RAILWAY COMPANY, *Appellant*.¹

ELECTION OF REMEDIES—MASTER AND SERVANT—ACTIONS—FEDERAL STATUTES. Where plaintiff sued for personal injuries under the Federal employers' liability act, and resisted a removal of the case to the Federal court upon his right to sue in the state court under the Federal act, he elected as between a right of action at common law and under the Federal act, and must abide by his election as fixing the law of the case.

COMMERCE—INTERSTATE COMMERCE—EMPLOYMENT WITHIN—FEDERAL STATUTE. The building of a scaffold upon which a workman was to stand while painting the roof of a freight shed used in interstate commerce is not a service rendered in the movement of interstate commerce, within the Federal employers' liability act; since it had no direct or immediate connection with interstate commerce and was not a necessary incident in the movement of interstate freight.

Appeal from a judgment of the superior court for King county, Frater, J., entered January 15, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in falling from a scaffold. Reversed.

F. V. Brown and *F. G. Dorety*, for appellant.

Carkeek & McDonald, for respondent.

MORRIS, C. J.—Appeal from a judgment in favor of respondent upon verdict in his favor. The action was brought under the Federal employers' liability act, and the first question to be determined is whether or not respondent was, at the time of his injury, engaged in interstate commerce and, therefore, within the act. If he was not so engaged, then this action must fail.

Respondent was employed by appellant as a laborer. On the day in question, he was directed to go down to appellant's

¹Reported in 161 Pac. 69.

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freight shed, in which interstate commerce was handled, and paint or whitewash the ceiling of the shed. For this purpose a scaffold was to be erected upon which respondent and those engaged with him were to stand while applying the paint. Arriving at the shed, respondent and two others, Wood and Casey, were directed by McGinity, the foreman in charge, to build the scaffold out of four-by-fours laid across the main rafters of the shed about thirteen feet above the floor. Upon these four-by-fours, two-by-ten planks were to be laid, but not nailed, as it would be necessary to move the planks as the work progressed. After directing them how to build the scaffold, McGinity showed them a pile of lumber out in the yard from which the necessary timber for the scaffold was to be procured. Wood, Casey and respondent thereupon proceeded to build the scaffold.

At the time of the accident, respondent was up on the scaffold putting the planks in place, and Wood and Casey were below passing them up. Wood noticed that one of the four-by-fours already in place was showing signs of breaking, and he and Casey went out to the pile of lumber and obtained another timber to place under the defective four-by-four as a brace. This was done, and while the brace was being held in place by the men below, Wood directed respondent to nail its upper end to the four-by-four. Respondent proceeded to do so, kneeling upon a plank, when the four-by-four broke and he fell to the floor. These facts will be sufficient to determine the question suggested.

Respondent, having resisted a removal of his case to the Federal courts upon his right to sue in the state court under the Federal statute, elected as between a right of action at common law and one under the Federal act and must abide by his election as fixing the law of the case. *Baird v. Northern Pac. R. Co.*, 78 Wash. 67, 138 Pac. 325.

The freight shed itself, as a storehouse and place for the handling of interstate commerce, is conceded by appellant to

be an instrumentality made use of in interstate commerce, but it does not follow that the building of a scaffold to be used in the painting of an interstate commerce freight shed bears such a relation to the movement of interstate freight, or is such an integral or necessary part thereof, as to make such work fall within any definition or test of interstate commerce that has up to this time been announced. In *Horton v. Oregon-Washington R. & Nav. Co.*, 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8, we reviewed the cases then reported to determine a practical test to apply to cases that would fall within the act, and reached the conclusion that the employment of the injured servant must be in connection with some instrumentality used in interstate commerce, and that the relation of the employment to interstate commerce must be such that an injury to the servant tended to hinder or delay the movement of trains engaged in such commerce. We sustained the action as within the act in that case upon the theory that an employee whose duty it was to attend a pumping plant furnishing necessary water to interstate trains was employed in furthering the movement of interstate traffic as much as the fireman who stoked the engine, the switchman moving oil for use in an interstate engine, or the servant who repaired the engine or cars; and that in going to his employment by the means supplied by the master, he was under the protection of the act to the same extent as the fireman passing from one phase of his employment to another, in each of which cases the action has been sustained. *Northern Pac. R. Co. v. Maerkl*, 198 Fed. 1; *Lamphere v. Oregon R. & Nav. Co.*, 196 Fed. 336; *Montgomery v. Southern Pac. R. Co.*, 64 Ore. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13.

We again passed upon the character of employment necessary to bring the servant under the Federal act in *Bolch v. Chicago, Milwaukee & St. Paul R. Co.*, 90 Wash. 47, 155 Pac. 422, where a switchman was injured while engaged in the removal of cars from one repair track to another, and sustained the action because of testimony that one of the cars being

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moved was loaded with lumber destined for transportation to the state of South Dakota. We there reasoned that the interstate transportation to which this car was then devoted was not ended merely because the car had become temporarily disabled and had been placed upon the repair track awaiting repairs. No case, either state or Federal, has gone farther in sustaining liability under the Federal act than either the *Horton* or the *Bolch* cases, but in each of those cases the work in which the servant was engaged at the time of his injuries was within the test announced in the *Horton* case, or, as said in *New York Cent. & H. R. Co. v. Carr*, 238 U. S. 260, at the time of the injury the employee was engaged in an act which was so directly and immediately connected with interstate commerce as substantially to form a part or a necessary incident thereto.

Adopting this liberal rule of interpretation, the facts here presented do not come within it. The building of a scaffold in a freight shed upon which a workman is to stand while painting the roof has no direct or immediate connection with interstate commerce, nor is it a necessary incident in furthering the movement of interstate freight. It may be admitted that the freight shed is an instrumentality made use of in interstate commerce, but the respondent was not at work upon the freight shed. His act was at least one step removed from any connection with interstate commerce or any of its instrumentalities, either directly or indirectly.

This view is in harmony with that expressed in *Illinois Cent. R. Co. v. Rogers*, 221 Fed. 52, where it was held that a workman engaged in cleaning stencils used in the manufacture and repair of interstate cars was not entitled to the protection of the Federal act. It is likewise sustained by *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, L. R. A. 1916C 797. There a workman employed in the railway machine shops where repairs were made to engines operated in interstate commerce was injured while moving a heavy shop fixture used in repair work. It was held that the connection between

the fixture and interstate transportation was too remote, the only function of the fixture being to communicate power to machinery used in repairing engines, some of which were used in such transportation. So here, the only function in building this scaffold was to assist in painting a freight shed which stored interstate commerce. If moving a fixture which furnishes power to machinery used in interstate commerce is without the act, then, by the same reasoning, the building of a scaffold to be used in painting a freight shed used in interstate commerce is without the act. The *Shanks* case cites in its support *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, in which it was held that a miner setting off a charge of dynamite for the purpose of blasting coal to be used in interstate commerce was not engaged in interstate commerce. If the mining of coal for use in interstate commerce is not an engagement in such commerce, then building a scaffold for a freight shed used in interstate commerce is not employment in such commerce.

Respondent relies upon *Columbia & P. S. R. Co. v. Sauter*, 223 Fed. 604. It there appears that the railroad company was building a trestle across Cedar river to serve as a temporary structure for passing trains engaged in interstate traffic, and as a falsework for rebuilding an old bridge. An employee was at work in making a clear space in which piles could be driven among logs and debris that had drifted against a supporting truss, when the bridge fell upon him. The court held that the employment was in interstate commerce. This case can be readily supported under all the cases. The trestle was an undoubted instrumentality of interstate commerce, and the driving of piles and the clearing of the necessary space through which they could be driven was a necessary incident in the building of the trestle. The abundant reason for this holding does not, in our judgment, support respondent's position.

Eng v. Southern Pac. R. Co., 210 Fed. 92, is also relied upon. The injured workman was there employed in construct-

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ing an office in a freight shed operated in connection with interstate commerce; held, the employment was in interstate commerce, since the freight shed was an instrumentality used in such commerce, and the work being done was in maintaining it in proper condition. This case would be authority for holding that painting the roof of the freight shed was employment within interstate commerce. Respondent was not so engaged. He was building a scaffold which was neither a necessary nor any part of the freight shed. To say that, while painting the roof, the workman was engaged in interstate commerce, but not so engaged while building the scaffold, is a sound distinction under the authorities which hold that a workman may often and rapidly during the same day pass from one class of employment to another. *New York Cent. & H. R. Co. v. Carr, supra.*

Many other cases are cited where workmen were injured while working upon repair shops, roundhouses, stations and outhouses, all of which were held to be instrumentalities of interstate commerce. These cases would be authority here if respondent were working upon the freight shed.

We cannot escape the conclusion that the respondent was not engaged in interstate commerce, and for this reason his action must fail.

The judgment is reversed, and the cause remanded with directions to dismiss.

MOUNT, FULLERTON, and ELLIS, JJ., concur.

CHADWICK, J., concurs in the result.

[No. 13483. Department Two. November 22, 1916.]

ANNIE WILCE *et al.*, *Appellants*, v. THE CITY OF CHENEY
et al., *Respondents*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—RESOLUTION OF INTENTION—SCOPE—SUFFICIENCY—STATUTES. A resolution of intention to improve a number of streets by grading, constructing cement sidewalks, gutters and "drainage culverts and catch basins," fairly informs the property owners, as required by Rem. 1915 Code, § 7892-10, of the "nature" of an improvement including a storm sewer six blocks long with five manholes, which was necessary for the proper drainage of the improvement, and the cost of which was less than six per cent of the cost of the entire improvement; especially where the diagram called for by the law was on file before the time for filing remonstrances had expired and indicated the exact nature of the proposed drainage system; since the law requires only that the "nature" of the improvement be set forth in general terms.

SAME. In such case, it is not necessary for the resolution to specifically direct the street committee to prepare the diagram so as to show the storm sewer and manholes and all the details, where the intention was that such details be shown by the diagram, and were in fact so shown.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 18, 1916, dismissing an action to enjoin a public improvement, tried to the court. Affirmed.

Graves, Kizer & Graves, for appellants.

Louis F. Bunge and *Wakefield & Witherspoon (E. P. Twohy*, of counsel), for respondents.

PARKER, J. — The plaintiffs, Annie Wilce *et al.*, commenced this action in the superior court for Spokane county, seeking to have the city of Cheney and its officers enjoined from constructing a proposed local street improvement and charging the cost thereof by special assessment against the property of the plaintiffs and others. The cause being heard upon the merits in the superior court, judgment was rendered

¹Reported in 161 Pac. 72.

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denying the relief prayed for by them, from which they have appealed to this court.

The contention of counsel for appellants is, speaking generally, that the city is proceeding without jurisdiction, or rather in the wrongful exercise of jurisdiction, in that the improvement, as finally ordered by ordinance and for the construction of which a contract was entered into, includes items of construction not mentioned or contemplated by the terms of the resolution of the city council declaring its intention to construct the improvement, and that, therefore, appellants had no opportunity to object to the improvement as finally ordered and contracted for by the city.

The controlling facts are not in dispute and may be summarized as follows: In May, 1915, the city council adopted a resolution declaring its intention to improve a number of the streets of the city by grading, constructing cement sidewalks, crosswalks, and gutters, and by "constructing drainage culverts and catch basins, as will more fully appear from the diagram and print which the committee on 'Streets and Alleys' is hereinafter ordered to provide; constructing a concrete gutter, also concrete curbs on First street between D street and G street." This quoted language is the only portion of the resolution which could be construed as having reference to the items of construction of which appellants complain. The resolution directs notice of hearing to be given, and also directs the committee on streets and alleys to prepare estimates of the cost of the proposed improvement, and also a diagram thereof and of the district showing the property to be charged with the cost thereof, as required by the local improvement law. Notice was accordingly duly given and an estimate and diagram also were prepared and filed. Upon this diagram there is designated as a part of the proposed improvement a storm sewer six blocks long in one of the streets proposed to be improved, and also five manholes in connection therewith. These are the principal items of construction complained of by appellants as not being provided for or men-

tioned in the resolution of intention. Thereafter, the time for remonstrances against the making of the improvement having expired, the city passed an ordinance finally ordering the construction of the improvement, including the storm sewer and manholes as designated upon the diagram filed in pursuance of the resolution of intention, and before the expiration of the time for filing remonstrances by the property owners. The contract for the construction of the improvement was accordingly entered into for the lump sum of \$37,000. It is agreed that the storm sewer and five manholes designated upon the diagram as composing a part of the improvement would cost \$2,173.50, or a little less than six per cent of the total cost of the entire improvement. The improvement district embraces about seventy-five ordinary city blocks, and the improvement is of substantially all of the portions of the streets bordering upon these blocks, so that the storm sewer and manholes in connection therewith form a comparatively small part of the improvement as to both quantity and cost. It was shown at the trial that the storm sewer and manholes in connection therewith were necessary to the proper drainage of the improvement, as much so as the catch basins and culverts which were specifically mentioned in the resolution of intention.

By the general local improvement law, the initiation of a local improvement proceeding may be either upon petition of the owners of property to be benefited by such improvement or directly by resolution of the city council. Section 10 of the law, relating to the initiation of such a proceeding by resolution, reads as follows:

"Any such improvement may be initiated directly by the city or town council by a resolution declaring its intention to order such improvement, setting forth the nature and territorial extent of such proposed improvement, and notifying all persons who may desire to object thereto to appear and present such objections at a meeting of the council at the time specified in such resolution; and directing the proper board, officer or authority to submit to the council at or prior

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to the date fixed for such hearing the estimated cost and expense of such improvement, and a statement of the proportionate amount thereof which should be borne by the property within the proposed assessment district, and a statement of the aggregate assessed valuation of the real estate, exclusive of improvements, within said district according to the valuation last placed upon it for the purposes of general taxation, together with a diagram or print showing thereon the lots, tracts and parcels of land and other property which will be specially benefited thereby and the estimated amount of the cost and expense of such improvement to be borne by each lot, tract, or parcel of land or other property. Such resolution shall be published in at least two consecutive issues of the official newspaper of such city or town, the date of the first publication to be at least fifteen (15) days prior to the date fixed by such resolution for hearing before the city council. . . ." Laws of 1911, p. 444, § 10 (Rem. 1915 Code, § 7892-10).

It is insisted in appellants' behalf that the city council's resolution of intention to construct the improvement did not, as required by § 10 of the local improvement law above quoted, include the storm sewer and manholes which were constructed as a part of the improvement, so as to furnish appellants an opportunity to object to the construction of the improvement as finally ordered and contracted for by the city authorities. Counsel invoke a rule of strict construction and of strict compliance with the provisions of § 10 such as, they argue, find support in the early decisions of this court in *Buckley v. Tacoma*, 9 Wash. 253, 37 Pac. 441; *McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447, 658, and *Kline v. Tacoma*, 11 Wash. 193, 39 Pac. 453, dealing with somewhat similar provisions of the then existing city charter of Tacoma. In the *Buckley* case, the initial resolution was in terms a resolution of intention, while the charter provided in terms that it should be a resolution ordering the improvement. It declared the council's intention as follows:

"To improve 'N' street in Buckley's addition from Steele street to Pine street at the expense of the abutting owners. Grading and sidewalking."

No survey or diagram of the proposed improvement was made or filed, as required by the charter, nor was the property to be charged with the cost of the improvement mentioned or described in any manner. Upon these facts, it was held that the city had proceeded with the construction of the improvement without jurisdiction. In the *McAllister* case, the resolution and notice thereof only showed the intention of the city to construct an improvement to consist of paving a roadway fifty-four feet wide with bituminous rock upon a six-inch concrete foundation. Thereafter a contract was let by the board of public works (not by the city council) for the improvement, to include the construction of curbs and sidewalks. We note that the added curbs and sidewalks in that case constituted a much larger proportion of the improvement than do the storm sewer and manholes of this improvement. Besides, it is plain that a resolution to merely pave the roadway of the street does not include the construction of sidewalks and, it might also be well argued, does not include the construction of curbs. These facts were held to show that the city proceeded without jurisdiction. In the *Kline* case, the city was held to have proceeded without jurisdiction because the improvement was attempted to be initiated by a mere resolution of intention, when the charter expressly provided that it should be initiated by a resolution *ordering* the improvement.

While we would not now be inclined to overrule those decisions were the facts there involved again presented to us under the provisions of the then existing charter of the city of Tacoma, we think they are not controlling here in the light of a later expression of this court and the present local improvement law. In *North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022, it was held that the estimates and plans on file might be looked to in aid of the resolution of intention, manifestly upon the theory that the estimates and plans on file, before the time for filing remonstrance by the property owners expires and after which the question of finally order-

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ing the improvement is to be decided by the council, furnished the property owner information touching the nature of the improvement, as well as the initial resolution itself. It would seem then that, if this resolution of intention, together with the diagram filed in pursuance thereof and referred to therein, fairly informed appellants of the "nature" of the improvement, it cannot be said that the city proceeded without or in the wrongful exercise of its jurisdiction in finally ordering the construction of the improvement and contracting therefor. Now, it seems to us that the language of the resolution providing for "constructing drainage culverts and catch basins," etc., is a plain indication of the intention of the council to cause to be constructed a drainage system in connection with and as a part of the improvement, though the language of the resolution may not suggest any very elaborate or extensive drainage system. But it does refer to the diagram for further details as to the proposed drainage. This diagram was, as we have noticed, on file before the time for filing remonstrances expired and before the improvement was finally ordered, enabling appellants to readily learn the exact nature and extent of the proposed drainage system. An examination of the diagram shows that this comparatively short storm sewer and the few manholes in connection therewith are for the purpose of carrying the surface water away from the catch basins and culverts, and are manifestly necessary for that purpose, and a proper completion of the improvement, and constitute a very small part thereof as to both quantity and cost. Indeed, this storm sewer, considering the short distance it runs, its connection with the catch basins and culverts proper, and the entire district, is little else than a culvert within itself, though it is probably not strictly so in view of the fact that it does not run crosswise under the street. Yet it is manifestly little else than that in view of the purpose it serves. It seems to us that § 10 of the local improvement law above quoted, requiring that the resolution of intention shall set forth the "nature" of

the improvement, means only that the resolution shall set forth in general terms a description of the improvement, and that such a description complies with the law without the necessity of entering into details. We think that this resolution, read in connection with the diagram filed in pursuance thereof, was such a compliance with § 10 of the local improvement law as to enable us to say that the city was not proceeding in the wrongful exercise of its jurisdiction.

Some contention is made that the culverts and catch basins were also wrongfully included in the improvement. This contention is manifestly without merit, in view of the fact that "culverts and catch basins" are specifically mentioned in the resolution of intention as constituting a part of the proposed improvement.

Some contention is made resting upon the fact that the resolution of intention does not in terms seem to direct the streets and alleys committee to prepare the diagram so as to show the storm sewer, manholes, and other details of the construction of the improvement thereon. However, when the resolution of intention is read as a whole, it is, we think, plain that the council intended such details to be shown upon the diagram, as they are in fact shown. We conclude that the diagram in this respect was as effectual in informing the property owners of the nature of these items of construction as if the direction to the streets and alleys committee had been more specific in the resolution as to placing of this data upon the diagram.

We conclude that the superior court properly disposed of the cause, and its judgment is therefore affirmed.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

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[No. 13638. Department One. November 22, 1916.]

THE STATE OF WASHINGTON, *on the Relation of G. L. Twiss,*
Plaintiff, v. THE SUPERIOR COURT FOR LEWIS COUNTY
*et al., Respondents.*¹

EMINENT DOMAIN—COMPENSATION BEFORE TAKING—WAIVER—INJUNCTION—REMEDY IN DAMAGES. Where by consent entry upon land was made for the construction of a railroad under a verbal agreement as to the compensation, and the grade was completed and the right of way fenced off, with no steps taken to recover possession for two years, the owner waived his constitutional right to compensation in advance; hence injunction does not lie to restrain further work until compensation is made, but the owner is relegated to his action in damages.

Certiorari to review an order of the superior court for Lewis county, Rice, J., entered August 18, 1916, dissolving a temporary restraining order, after a hearing before the court. Affirmed.

C. A. Studebaker, for relator.

Forney & Ponder, for respondents.

ELLIS, J.—Certiorari to review an order of the superior court of Lewis county dissolving a temporary restraining order. From the return it appears that relator is, and at all times material to this inquiry was, the owner of the south half of the southwest quarter and the southwest quarter of the southeast quarter of section 26, township 13 north, range 1 east, W. M., in Lewis county. In the spring of 1914, relator and the Washington Electric Railway Company, a public service corporation organized under the laws of this state, entered into a verbal agreement whereby that company was to be permitted to construct its grade and tracks and to operate its trains across relator's lands upon a right of way thirty-five feet wide extending along the north line of the

¹Reported in 161 Pac. 68.

westerly eighty acres above described, and seventy feet wide extending diagonally in a southeasterly direction through the easterly forty acres above described. It was admitted in argument that the thirty-five foot right of way across the first mentioned tract was to be donated free of cost to the electric company, and that the seventy foot right of way across the easterly forty acres was to be paid for at a price to be agreed upon between the parties. The agreement was conditioned upon the construction of the road so as to be ready for the regular operation of trains within sixteen months. In June, 1914, the electric company entered upon the lands with relator's permission, and thereafter, with relator's knowledge, consent and acquiescence, constructed the grade for its road on the north thirty-five feet of the eighty-acre tract and across the easterly forty, and fenced and ditched the right of way throughout its extent across both tracts. Three written agreements were prepared at different times, two by the electric company and one by relator, but each side rejected each writing as prepared by the other, claiming that it did not conform to the oral agreement.

It is claimed that, in the construction of its grade, the electric company deviated from the right of way as proposed and agreed upon at a point near where it passed from the eighty-acre tract onto the easterly forty, but it is admitted that this deviation was slight, being possibly about forty feet. It appears that some objection was then made by relator, but whether after the grade was completed or before does not appear. No proceeding of any kind has ever been brought to forfeit the easement for the right of way because of the failure of the company to construct the road within the time agreed upon. After the grade was completed, the electric company ceased work upon its line and nothing further was done until the spring of 1916, when it conveyed its line to respondent Chehalis, Cowlitz & Cascade Railway, which it seems to be assumed is also a public service corporation. In June, 1916, respondent began leveling the grade across re-

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lator's land for the imposition of ties and rails. In August, 1916, relator brought an action to enjoin respondent from proceeding with the work, and claiming \$200 damages for the work already done. A temporary restraining order was issued. Respondent moved to dissolve this restraining order and, upon a hearing, the trial court granted the motion, the order being conditioned upon respondent's filing a bond of \$500, or cash in lieu of bond in that sum, as security for any damages which relator might recover. Respondent deposited \$500 in court and proceeded with the work of laying its track, whereupon relator instituted this proceeding. It is admitted that the deposit of \$500 will be amply sufficient to cover all damages which relator may suffer by reason of the taking of his lands for a right of way.

Relator rests upon the elementary proposition that, under our constitution, private property cannot be taken for a public use without just compensation first being ascertained and paid. He relies upon *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385. The court there had under review an order which permitted the defendant to damage private property and substituted a bond for the damages which the constitution declares must be assessed and paid in advance. It was therefore properly held that an unconditional injunction should have been granted. But it does not follow from that decision that the right to compensation in advance may not be waived and the property owner thereafter relegated to his remedy in damages. In *Kaufman v. Tacoma, Olympia & G. H. R. Co.*, 11 Wash. 632, 40 Pac. 137, this court said:

"The charter provided that before private property should be taken or damaged, the damages should be ascertained and paid, and the constitutional provision aforesaid was to the same effect. This was not done, but the respondents saw fit to allow the work to proceed without attempting to restrain the performance of it, or to recover damages prior to its completion, and thus waived payment in advance and were confined to their right to bring an action to recover."

In *Kakeldy v. Columbia & Puget Sound R. Co.*, 37 Wash. 675, 80 Pac. 205, this court said:

"An owner of land who stands by and without protest sees a railroad constructed thereon, is estopped thereafter to maintain an action in ejectment, or a suit for injunction, to prevent the operation of the road. His remedy is limited to an action for damages for his compensation."

In the case before us, respondent's predecessor in interest, the electric company, entered upon the relator's land in 1914 with his full consent and under a verbal contract. The relation of the parties was purely contractual. The right of way as now occupied by respondent was then fenced throughout. The grade for the road was fully completed across all of the relator's land. It is true relator claimed that there was a slight deviation at one point from the line as agreed upon and that he did not know of this at the time, but it is admitted that he did know of it in 1914 at about the time the grade was completed. Though he then objected he took no steps to recover the land, and the electric company and the respondent here, as its successor, have been in possession ever since. From the negotiations then and thereafter had, even down to a letter written by relator G. L. Twiss on May 31, 1916, it is clear that relator was not objecting so much to this slight deviation as to the amount of compensation offered by respondent and its predecessor. We are clear that, under the foregoing decisions, relator has waived his right to compensation in advance for the taking and is relegated to his action in damages. Moreover, whatever damages can ever be caused by the building of respondent's road were inflicted in 1914, when the grade was constructed and ditched and the right of way fenced. "It is not the function of injunction to correct past injuries." *Hodgeman v. Olsen*, 86 Wash. 615, 150 Pac. 1122, L. R. A. 1916A 739; 1 High, Injunctions, p. 38.

The order under review is affirmed.

MORRIS, C. J., MAIN, PARKER, and CHADWICK, JJ., concur.

[No. 13754. Department One. November 22, 1916.]

THE STATE OF WASHINGTON, *on the Relation of First
Thought Gold Mines, Limited, Plaintiff*, v. THE
SUPERIOR COURT FOR STEVENS COUNTY, *W. H.
Jackson, Judge, Defendant*.¹

TAXATION — EXCESSIVE ASSESSMENT — REDUCTION — PENALTY — INTEREST — STATUTES. Where a taxpayer has suffered an excessive assessment and tendered a sum which he considered fair, based upon a valuation alleged to be consistent with the valuation upon other land, and the tax is set aside and reduced as fraudulently excessive, the amount found due by the court does not draw interest at the rate of fifteen per cent per annum, under Rem. 1915 Code, § 9219, providing that delinquent taxes shall draw interest at fifteen per cent per annum from the date of delinquency; in the absence of any provision in the statute for the payment of interest or the remission of interest where a tax is questioned, either in whole or in part.

SAME. Interest on delinquent taxes is a penalty, and a penalty that is illegal in part is wholly void.

SAME. A judgment of the supreme court directing a judgment in a reduced sum for a fraudulently excessive tax does not provide for the fifteen per cent penalty which attaches to delinquent taxes only by force of statute.

Application filed in the supreme court September 26, 1916, for a writ of mandamus to compel the superior court for Stevens county, Jackson, J., to enter a judgment. Granted.

L. C. Jesseph, for relator.

Howard W. Stull and *H. Wade Bailey*, for respondent.

CHADWICK, J.—This case is an aftermath of the case of *First Thought Gold Mines v. Stevens County*, 91 Wash. 437, 157 Pac. 1080, reference to which should be made for all material antecedent facts. When the remittitur went down, counsel for the appellant, relator here, prepared a judgment for an amount equal to an assessment at the established rate upon the values fixed by this court. The prosecuting attor-

¹Reported in 161 Pac. 77.

ney objected to the form of the judgment in that it did not provide for interest at the rate of 15 per cent per annum covering the period of delinquency. The court was of opinion that the judgment should have provided for the payment of interest at the rate of 15 per cent per annum on the taxes found by this court to be due, and accordingly refused to sign the judgment. Whereupon the appellant sued out an original writ of mandamus in this court to compel the entry of the judgment.

It is provided that all delinquent taxes shall draw interest at the rate of 15 per cent per annum from the date of delinquency. Rem. 1915 Code, § 9219. There seems to have been no provision made by statute for the payment of interest, or the remission of interest, where the tax is questioned, either in whole or in part, and we are driven to the general principles of the law as they are to be gathered from the adjudged decisions.

Cottle v. Union Pac. R. Co., 201 Fed. 39, is one of the best considered cases that has been called to our attention, and from the many authorities cited therein we gather the following as established principles: That a tax, void entirely, gives no rights and will carry no penalties, either by way of interest or otherwise; that a tax valid in part and void in part will carry a penalty, either by way of interest or otherwise, to the extent that it is valid, if the amount of the tax which is valid can be reasonably ascertained, and unless tender is made of the amount legally due, interest and penalties will attach from the date of delinquency; that, where the amount of the tax is not divisible or the amount that ought to be paid cannot be readily ascertained, as where the tax is so excessive as to warrant a holding that it is arbitrary and, therefore, constructively fraudulent as to the excess, the tax is nevertheless legal within the legal power to tax, and is void only as to the unlawful excess. It is also well established that interest upon a delinquency is no part of a tax. It is sustained only as a penalty to insure prompt payment.

People ex rel. Johnson v. Peacock, 98 Ill. 172. And this is so whether the penalty be in the way of interest, the addition of a certain per cent, or by doubling the tax. Desty, Taxation, § 190.

Interest upon delinquent taxes is a penalty and not interest within the general acceptance that it is a consideration for the forbearance of money. *Evansville & T. H. R. Co. v. West*, 139 Ind. 254, 37 N. E. 1009. This principle is most frequently illustrated in that line of cases holding that, where the legislature passes a law for the taxation of property theretofore omitted as a subject of taxation, it cannot provide for interest from some antecedent date, but must provide some future time within which the tax must be paid, after which interest may be demanded. In other words, even the state cannot take more than the actual tax, whether under the guise of interest or otherwise, until the taxpayer has failed or omitted to perform a duty imposed by law.

Where a taxpayer has suffered an excessive assessment, he may tender a sum that he considers to be fair, considering the value of his property and the assessment of other like property. *Landes Estate Co. v. Clallam County*, 19 Wash. 569, 53 Pac. 670. See, also, *Miller v. Pierce County*, 28 Wash. 110, 68 Pac. 358.

By resorting to the record in the main case, we find that relator made a tender, based upon a valuation which it is alleged is consistent with the valuation put upon other like property, which was refused, and which was made good by a tender in court. This, under any theory, ought to satisfy the law; for if it be the duty of a taxpayer to make tender at all where a tax is alleged to be fraudulently excessive, a show of willingness, accompanied by tender, is all that can be required, for the actual amount due, being a subject of judicial inquiry, cannot be determined by the taxpayer. It may be greater or less.

There is another rule that is pertinent, that is, if a penalty is "illegal in part it is wholly void." 2 Cooley, Taxation

(3d ed.), p. 902; *Michigan Cent. R. Co. v. Slack*, Fed. Cas., No. 9,527. This is evident, for the penalty is a thing which is essentially entire, and therefore indivisible, and attaches only when the obligation is certain, or can be made certain by proper calculation.

Respondent relies primarily upon the case of *Western Union Tel. Co. v. State*, 64 N. H. 265, 9 Atl. 547. It was there held that, although an assessment was excessive to the extent that it was reduced after judicial inquiry to the extent of two-fifths, the taxpayer was nevertheless chargeable with interest on what it was finally held he should pay. The court said:

"All other taxpayers either paid their taxes on or before the first of December of these years, or became liable to pay interest thereafter till they did pay them, and justice requires that the plaintiffs should pay interest on their just and equal portion of the public burden due the state on or before the first of December in each of these years. Had the plaintiffs tendered or offered to pay, when due, the sum afterwards found to be their proportional share, and the state had declined or neglected to take the same, a different case would be presented. *Heyward v. Hartshorn*, 55 N. H. 476, 483; *Thompson v. Railroad*, 58 N. H. 524. A taxpayer, appealing from an excessive assessment, may be unable to determine the exact amount which will be found by the appellate court to be his share of the public expense. He may be unable to protect himself against the interest that will accrue after the first of December by paying the exact amount of his tax debt before it is ascertained. But this is not a reason for giving him an exemption that is not enjoyed by his neighbors who do not appeal."

Just how or why a taxpayer should be called upon to pay interest when he has neither failed nor refused to pay that which may be lawful is not explained. The case seems to stand alone. So far as we have been able to find, it has been cited but once. See *Hartford v. Hills*, 72 Conn. 599, 45 Atl. 433. Its holding was not essential to sustain the reasoning of the court. Nor does it even remotely bear upon the real

issue in that case. The case decided was no more than this: when a taxpayer contests the whole of a tax as illegal, and the court finds that it is valid *in toto*, he is bound to pay the statutory penalty. No other conclusion could have been arrived at. Were it otherwise, all penalties could be avoided by suit. The New Hampshire case is not cited by either Mr. Desty or Mr. Judson in their works on Taxation. Its holding is not consistent with the law as we gather it from the text of Cooley on Taxation (3d ed.), p. 901. The case is referred to by that author in a foot note, but without comment. The text, based upon other cases, which we shall notice, is: "It has been held that if the delay is attributable in part to the state itself . . . the collection of a penalty might be enjoined, and in another case it is said that the penalty should not be exacted if the delay came from serious doubt of the validity of the tax."

It would seem that a tax so excessive as to warrant a holding that it was constructively fraudulent as to the excess, would make the state chargeable with the delay in its payment, for no man is bound to pay a void tax. That the excess is void, has been held so often by this court that the citation of the cases is unnecessary. See the principal case, *First Thought Gold Mines v. Stevens County*, 91 Wash. 437, 157 Pac. 1080.

In *County of Redwood v. Winona & St. Peter Land Co.*, 40 Minn. 512, 41 N. W. 465, 42 N. W. 473, the court, in discussing an analogous question, said:

"A penalty for the nonpayment of a tax cannot be imposed until the person has an opportunity to pay it, and fails to do so. What we have heretofore said regarding 'interest' is equally applicable to penalties. Now, as the whole tax extended against a tract of land is an entirety, the owner cannot pay a part of it without paying the whole; and if a part of it is illegal, and he pays the whole, ordinarily it would be a voluntary payment, and he could not recover back the illegal part. Hence in such a case his only remedy is to wait until proceedings are commenced to enforce judgment against

words "and every other," etc., do not limit the act to "intoxicating liquors," but adds to the things specifically enumerated; hence the act includes "malt," liquors that are not intoxicating, and the rule of *ejusdem generis* has no application.

SAME—PROHIBITION—PROSECUTION—INTOXICATING QUALITIES — PRESUMPTION AND PROOF. Under the state wide prohibition act, Rem. 1915 Code, §6262-2, defining intoxicating liquors, the liquors enumerated by name are conclusively presumed to be intoxicating, and as to "any other intoxicating liquors" capable of being used as a beverage, the intoxicating quality must be proved.

SAME — PROHIBITION — STATUTES — "MALT LIQUORS." The words "malt liquors," in Rem. 1915 Code, § 6262-2, are not used in a technical sense, but mean, as defined in the standard dictionaries, an alcoholic and fermented liquor brewed from malt and do not include a nonalcoholic or nonfermented liquor containing "malt."

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 24, 1916, upon a conviction of violating the state-wide prohibition law, upon stipulated facts, after overruling a demurrer to the information. Reversed.

McClure & McClure and Greene, Henry & Hemrich, for appellant.

Alfred H. Lundin and Frank P. Helsell (Walter F. Meier, of counsel), for respondent.

ELLIS, J.—Defendant was accused of a violation of the state wide prohibition law, commonly known as initiative measure No. 3. Laws of 1915, p. 2; Rem. 1915 Code, § 6262-1 *et seq.* The information charged that:

"He, said Alvin Hemrich, in the county of King, state of Washington, on the 9th day of February, 1916, did then and there wilfully and unlawfully sell to one Fred M. Lathe certain intoxicating liquor, to wit: two bottles containing malt liquor, said malt liquor not then and there containing any alcohol, and being commonly known as 'Lifestaff,' receiving in payment therefor from said Fred M. Lathe the sum of twenty-five cents."

He demurred to the information, and it was stipulated that, in considering the demurrer, the court might consider as

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established certain agreed facts so far as they would be admissible as evidence if the cause were being tried on its merits after a plea of not guilty. These agreed facts were, in substance, as follows: (1) That defendant was, and for a long time had been, president of a corporation which, prior to January 1, 1916, was engaged in the manufacture and sale of beer in the state of Washington; that, immediately after that date, it surrendered its government license and remodelled its brewery and plant for the manufacture of "Lifestaff," so that on February 9, 1916, they were not adapted to the manufacture of beer without extensive alterations in equipment and the issuance of a new license from the United States government. (2) "That the liquid in the information herein referred to as Lifestaff is an unfermented liquid and is entirely free from alcohol, preservatives or other harmful substances, but contains between six and seven per cent of extract of malt; that it is a healthful and nutritious liquid, capable of being drunk, but the character of the liquid itself is such that it is not intoxicating, does not in fact contain intoxicating properties, and is not capable of being imbibed in unusual quantities for merely social purposes." (3) That the term "Lifestaff" has been copyrighted under the Federal laws and appropriated as a trade-mark under the state law. (4) That L. E. Kirkpatrick, president and attorney of the Anti-Saloon League for the state of Washington, and who prepared initiative measure No. 3 as submitted to and adopted by the people, would testify that, in the conferences held to prepare the act, there was, to his knowledge, no discussion of or expressed intention to prohibit by the act the manufacture or sale of any liquor not containing alcoholic properties; that he was then not aware that a process had been discovered for removing all alcohol from malt liquor, and that the question of prohibiting the manufacture and sale of malt liquor not containing alcohol was not considered by him nor discussed by others in his presence; that, in preparing the original draft of the act, the definition of intoxi-

of beverages not intoxicating in fact and wholly innocuous when separately considered, and may conclusively define such beverages as intoxicating liquors within the meaning of the prohibitory law whenever that course has any reasonable relation to the accomplishment of the dominant purpose. "This is no longer a question for argument or even of doubt." *State v. Frederickson*, 101 Me. 37, 63 Atl. 535, 115 Am. St. 295, 6 L. R. A. (N. S.) 186; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192. If, therefore, any beverage of such composition and character as reasonable to include the stuff called Lifestaff is expressly prohibited or defined by our law as an intoxicating liquor, then Lifestaff is prohibited.

It is next argued that nothing except "liquor" is prohibited, and that the word "liquor," *ex vi termini*, means an alcoholic or intoxicating liquid, and that, therefore, nothing but alcoholic or intoxicating liquids are prohibited. It is true that such is one of the meanings of the word "liquor," but all of the standard dictionaries agree that it also means a liquid of any sort. See Century Dictionary; Webster's New International Dictionary; and Standard Dictionary. The first two of these, the three leading dictionaries, give the meaning of the noun "liquor" as synonymous with the noun "liquid," and the third gives the same meaning as a secondary definition. It can hardly be said, therefore, that the word "liquor" has any such settled and exclusive meaning of an alcoholic or an intoxicating liquid as to make it the basis of a persuasive, much less of a conclusive argument, for such a construction of the statute. Appellant's minor premise failing, his argument fails.

A further argument is based upon the statutory definition of the term "intoxicating liquor" as found in § 2 of our prohibitory law, Laws of 1915, page 2 (Rem. 1915 Code, § 6262-2), which reads as follows:

"The phrase 'intoxicating liquor,' wherever used in this act, shall be held and construed to include whiskey, brandy, gin, rum, wine, ale, beer and any spirituous, vinous, fermented or

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malt liquor, and every other liquor or liquid containing intoxicating properties, which is capable of being used as a beverage, whether medicated or not, and all liquids, whether proprietary, patented or not, which contain any alcohol, which are capable of being used as a beverage."

Respondent concedes that the only term in this definition which can reasonably include a nonalcoholic nonintoxicating liquor, such as Lifestaff is admitted to be, is the term "malt liquor." Appellant urges that the clause "and every other liquor or liquid containing intoxicating properties" limits and restricts the classes of liquor specifically enumerated and preceding it to such liquors or liquids as contain intoxicating properties and that, therefore, the term "malt liquor" cannot include Lifestaff. It is insisted that such is the necessary significance of the word "other" as found in the alleged qualifying clause. Several decisions from other states are cited as sustaining this view. Typical and strongest of these are *Bowling Green v. McMullen*, 134 Ky. 742, 122 S. W. 823, 26 L. R. A. (N. S.) 895, and *People v. Strickler*, 25 Cal. App. 60, 142 Pac. 1121. In the *McMullen* case, the stipulated facts admitted that the liquor, called "next-to-beer," was a malt liquor containing less than two per cent and more than one-half of one per cent of alcohol and was nonintoxicating, that is to say, in the largest quantities in which it might be drunk it would not intoxicate. The statute defined the inhibited liquors as "spiritous, vinous, malt and other intoxicating liquors." The question was whether malt liquor which would not intoxicate was within this definition. It was held that the inhibition was only against intoxicating drinks. The court said: "If not, why use the words 'or other intoxicating liquors'?" However conclusive this may seem to the court which announced it, it seems far from conclusive to us. The answer to the court's question seems plain. The general words, "or other intoxicating liquors," were intended to add to the things theretofore specifically enumerated, not to take away from or limit what

had already been included. Moreover, even assuming the argument sound as applied to the statute there involved, that statute is palpably different from ours. It might be argued with some show of reason that the word "other" as there used qualifies the term "intoxicating liquors" as a whole. That statute says: "or other intoxicating liquors." In our statute the collocation of the words is different. It says: "Every other liquor or liquid," the word "other" thus qualifying only the words "liquor or liquid" which are subsequently qualified by the words "containing intoxicating properties." *State v. Bailey*, 67 Wash. 336, 121 Pac. 821.

Our statutory definition was clearly intended to define as intoxicating liquors three distinct groups: (1) Whiskey, brandy, gin, rum, wine, ale, beer and any spirituous, vinous, fermented or malt liquor; (2) every other liquor or liquid containing intoxicating properties which is capable of being used as a beverage, whether medicated or not; (3) all liquids, whether proprietary, patented or not, which contain any alcohol which are capable of being used as a beverage. The first group defines, *eo nomine*, as intoxicating liquors certain specific liquids without reference to their properties, because they are all liquors which are generally understood to contain alcohol in some quantity. The second group merely adds to the things prohibited another class of prohibited liquors with no description save the *intoxicating* quality. The third group adds still another class to the things already prohibited, namely, liquids whether proprietary or not, describing them by their *alcoholic* property. The words "every other liquor or liquid containing intoxicating properties" qualify nothing else, but describe and add another class to the things the sale and manufacture of which are prohibited. The clause quoted was intended to add and include, not to limit or restrict.

In the case of *People v. Strickler*, *supra*, a demurrer to an information charging the sale of malt liquor containing less than one per cent of alcohol was sustained by the trial court

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and the people appealed. The statute defined the term "alcoholic liquors" as follows:

"The term 'alcoholic liquors' as used in this act shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain one per cent by volume, or more, of alcohol and which is not so mixed with other drugs as to prevent its use as a beverage."

The supreme court affirmed the judgment on the ground that, under the rule *ejusdem generis*, the specific words "spirituous, vinous, and malt liquors" were qualified and controlled by the succeeding clause "any other liquor or mixture of liquors which contain one per cent, by volume, or more, of alcohol." The decision is obviously unsound. It reverses the rule of *ejusdem generis* in order to make the general terms of the statutory definition control the particular terms. The correct application of that rule in statutory construction is just the converse.

"In statutory construction, the '*ejusdem generis* rule' is that where general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." Black's Law Dictionary, p. 415.

See, also, Bouvier's Law Dictionary (Rawle's Third Revision), p. 979. The fact is that the rule *ejusdem generis* has nothing to do with the case. The statute there under construction, as ours, defined one group by specific enumeration and a second group by quality. The *McMullen* case makes the same mistake in argument, though not labeling the process as an application of the rule *ejusdem generis*. In the following cases, in which the same argument was advanced as that of appellant here, the courts have ruled contrary to his contention. In each of these cases the general clause in the statute included the word "other," as here. *Marks v. State*, 159 Ala. 71, 48 South. 864, 133 Am. St. 20; *Fuller v. Jack-*

son, 97 Miss. 237, 52 South. 873, 30 L. R. A. (N. S.) 1078; *LaFollette v. Murray*, 81 Ohio St. 474, 91 N. E. 294; *United States v. Cohn*, 2 Ind. Terr. 474, 52 S. W. 38. In the *Marks* case, the statute was much like ours. It prohibited:

“Any alcoholic, spirituous, vinous or malt liquors, intoxicating bitters or beverages or other liquors or beverages by whatsoever name called, which if drunk to excess will produce intoxication, . . .”

In answer to the argument here advanced, the court said:

“While we agree in part with counsel for appellant, we cannot concur with them in the contention (so forcibly and ably insisted upon) to the effect that the clause, ‘which if drunk to excess will produce intoxication,’ qualifies and relates to each and all of the liquors or beverages which precede it—that is, to alcoholic, spirituous, vinous, or malt drinks. We are inclined to the opinion that this phrase qualifies or refers only to the clause, ‘or other liquors or beverages by whatsoever name called,’ which immediately precedes it, and which two phrases, taken together, constitute one of the six classes of liquor and beverage the sale of which is prohibited. We are led to this conclusion, not alone by the composition, and grammatical construction of this section of the act, but also by a reference to the history of such legislation in this and other states, and the judicial construction put upon the terms ‘spirituous,’ ‘vinous,’ ‘malt,’ and ‘intoxicating’ liquors and beverages by this and other courts. These terms each had a well defined and accepted judicial construction by the courts, when used in such statutes; and it does not appear that there was any intention to change that well accepted judicial construction. They were severally treated as being well known and defined; but the phrase, ‘or other liquors or beverages by whatsoever name called,’ is clearly shown not to refer to every well known or defined class, but is intended to include any and all other classes or kinds, not embraced in the foregoing five classes named, ‘which if drunk to excess will produce intoxication.’”

The reasons given in the other decisions cited for holding the same way are equally cogent. It will not avail to use

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the argument of convenience to the effect that our construction will make the sale of "ginger ale" and "root-beer" criminal. These things have as distinctive a meaning in common parlance as ale or beer have when standing alone. They, like other unnamed beverages, will have to be tested by the fact whether they contain intoxicating properties, since they are not enumerated by name in the statutory definition of intoxicating liquors. *Sawyer v. Botti*, 147 Iowa 458, 124 N. W. 787, 27 L. R. A. (N. S.) 1007. We hold, therefore, that the liquors enumerated by name in our statutory definition of intoxicating liquors are conclusively presumed to be intoxicating liquors without regard to their actual intoxicating properties and whether in potable quantities they will in fact intoxicate or not. That, as to such liquors, it is only necessary to prove that the thing sold was of the class named, but that as to other liquors or liquids capable of being used as a beverage, it is necessary to prove their intoxicating properties. It is conceded that Lifestaff cannot belong to either the second or third class mentioned in the statutory definition. By this process of elimination, the question here involved is finally reduced to this: Is the stuff called Lifestaff a malt liquor? If it is, it is prohibited whether it contains intoxicating properties or not, and whether it contains alcohol or not.

The first cardinal rule of construction is that words used in a statute, unless the context shows that they are used in a technical or particular sense, are to be given their ordinary meaning. 2 Lewis' Sutherland, Statutory Construction (2d ed.), p. 749, § 390; Endlich, Interpretation of Statutes, p. 4, § 2. It follows that the words "malt liquor," which are evidently used in no technical sense, must be given the meaning accorded to them in the standard dictionaries of our language. The following are the definitions given by the three dictionaries universally recognized as authority:

Standard Dictionary: "*Malt liquor*, any alcoholic beverage brewed from malt."

Century Dictionary: "*Malt liquor*, a general term for an alcoholic beverage produced merely by the fermentation of malt as opposed to those obtained by the distillation of malt or mash."

Webster's New International Dictionary: "*Malt liquor*, an alcoholic liquor as beer, ale, porter, etc., prepared by fermenting an infusion of malt."

We have been unable to find any definition giving to the term malt liquor any other meaning than the above, whether technical or not. The text books are equally in unison. Joyce, *Intoxicating Liquors*, p. 12, § 12, defines malt liquor as follows:

"The common and approved usage of the term 'malt liquor' is 'an alcoholic liquor as beer, ale or porter, prepared by fermenting an infusion of malt.' 'Malt liquors' embrace porter, ale, beer, and the like, which are the result or product of a process by which grain—usually barley—is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and, by a further process of brewing, made into a beverage. In Alabama it has been decided that the court will take judicial notice of the meaning of the words 'malt liquor' as used in a penal statute, and may, in a proper case, give its definition in a charge to the jury."

Black's Law Dictionary, p. 752, defines the term as follows:

"*Malt liquor*. A general term including all alcoholic beverages prepared essentially by the fermentation of an infusion of malt (as distinguished from such liquors as are produced by the process of distillation), and particularly such beverages as are made from malt and hops, like beer, ale, and porter."

26 Cyc. 121, defines the term as follows:

"*Malt liquor*. An alcoholic liquor, as beer, ale, or porter, prepared by fermenting an infusion of malt; a general term for alcoholic beverages produced merely by the fermentation of malt as opposed to those obtained by distillation of malt or mash."

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19 Am. & Eng. Ency. Law (2d ed.), p. 705, defines it as follows:

"Malt liquor. Malt liquor is a general term for an alcoholic beverage produced merely by fermentation of malt, as opposed to those obtained by distillation of malt or mash."

Wherever any court has essayed a definition of the term "malt liquor," it is in strict accord with the foregoing definitions.

In *Pennell v. State*, 141 Wis. 35, 123 N. W. 115, 116, the court defined the terms spirituous liquor, malt liquor and vinous liquor as follows:

"The word 'liquor' in a statute regulating or forbidding the sale of intoxicants should be taken to mean an alcoholic beverage. Cent. Dict.; Standard Dict.; *People v. Crilley*, 20 Barb. 246; *U. S. v. Cohn*, 2 Ind. Terr. 474, 52 S. W. 38. The associated word 'drinks' in such statute means an alcoholic beverage. *State v. Oliver*, 26 W. Va. 422. Alcohol is a product of fermentation. Malting is a process preliminary to fermentation. Alcohol is separated, not produced, by distillation, and the liquor thus separated containing a percentage of alcohol is called spirituous liquor. Where there is no such separation, but the alcohol produced by fermentation remains in the liquid drawn off from the malt, the product is called malt liquor. Where the production of alcohol by fermentation is preceded by no malting process, as in the case of wine, the product is called vinous liquor."

In *Marks v. State*, *supra*, the court says:

"'Malt liquors' are the product of a process by which grain is steeped in water to the point of germination, the starch of the grain being thus converted into saccharine matter, which is kiln dried, then mixed with hops, and, by a further process of brewing, made into a beverage. The term embraces porter, ale, beer, and the like."

Though in the last definition the term "fermentation" is not used, but "brewing" instead, the term "brewing" itself includes fermentation. See Standard Dictionary; Webster's New International Dictionary; Century Dictionary.

In *United States v. Ducournau*, 54 Fed. 138, it was said:

"The ordinary acceptation of the term 'malt liquor' imports a fermented liquor, made chiefly of malt; . . ."

In *Sarlls v. United States*, 152 U. S. 570, Justice Shiras adopted the definition given in the Century Dictionary and above quoted.

In *State v. Gill*, 89 Minn. 502, 95 N. W. 449, the court said:

"But the defendant claims that there are some malt liquors which are not intoxicating; hence the complaint should have alleged the sale of an intoxicating malt liquor. This is just what the complaint did do without any tautology, for the term 'malt liquors' is used in the charter of the city, in the ordinance in question, and in the complaint in accordance with the common and approved usage of the term, and not in any technical sense. G. S. 1894, § 255. The common and approved usage of the term 'malt liquor' is 'an alcoholic liquor, as beer, ale or porter, prepared by fermenting an infusion of malt.' Webster's International Dictionary."

In *State v. Lynch* (Del.), 96 Atl. 32, the court used the following language:

"Malt liquor, or beer, as is commonly known, is a brewed liquor made of grain, especially barley, flavored with hops, and is a liquor which has undergone fermentation, and contains alcohol."

In *Ex parte Townsend*, 64 Tex. Cr. 350, 144 S. W. 628, Ann. Cas. 1914C 814, we find the following language:

"This leads to the inquiry of what is malt liquor. Mr. Joyce, in his work on Int. Liq. § 12, defines it as follows: 'The common and approved usage of the term 'malt liquor' is an alcoholic liquor, as beer, ale, porter, prepared by fermenting an infusion of malt.' The Century Dictionary defines it as a 'general term for an alcohol [alcholic] beverage produced merely by the fermentation of malt.' So, then, it is clear that all malt liquor is an alcoholic liquor, and the legislature in this instance was dealing with a non-intoxicating alcoholic liquor. Intoxicating liquor is any liquor containing alcohol which can be drunk as a beverage in such quantity as will produce intoxication."

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We have set out the foregoing definitions in order to show the absolute unanimity of opinion that "malt liquor" is an alcoholic liquor and is a fermented liquor. Fermentation produces alcohol. Every malt liquor is fermented and hence contains at least some percentage of alcohol. Unless the foregoing definitions are all wrong, such is the inevitable conclusion to which we are driven. The mere fact that a liquid contains malt does not bring it within any definition of the words "malt liquor" which can be found in any recognized dictionary, text book or in any definition given by any court. Malt is neither fermented nor does it contain alcohol. It is defined in the Century Dictionary as follows:

"Grain in which, by partial germination, arrested at the proper stage by heat, the starch is converted into saccharine matter (grape-sugar), the unfermented solution of the latter being the sweetwort of the brewer. By the addition of hops, and the subsequent processes of cooling, fermentation, and clarification, the wort is converted into porter, ale, or beer. The alcoholic fermentation of the wort without the addition of hops, and distillation, yield crude whiskey."

It is defined in Black's Law Dictionary as follows:

"*Malt.* A substance produced from barley or other grain by a process of steeping in water until germination begins and then drying in a kiln, thus converting the starch into saccharine matter."

We have been cited to but one case, and have been unable after many days of search to find another, in which any liquor or liquid has been held to be a malt liquor merely because it contained some percentage of malt. That case is *Purity Extract & Tonic Co. v. Lynch*, 100 Miss. 650, 56 South. 316. The liquid there involved was called "Poinsetta." It was admitted that it contained no alcohol, preservatives or saccharine; that it was sold as a beverage, that it was composed of 90.45 per cent pure distilled water, 9.55 per cent of solids derived from cereals in an unfermented state, and that it contained 5.73 per cent of malt. It was admitted that the grain

used was not fermented or steeped in such a way as to produce either saccharine matter or alcohol. On these facts the court said:

"In the discussion of this case we start out with the admission of counsel that this drink is a beverage containing no alcohol, it is true, but containing 5.73 per cent of malt, and we unhesitatingly pronounce the beverage a malt liquor. It can be nothing else."

Had that court hesitated long enough to look at any standard dictionary, any law dictionary or the decision of any court in which the term "malt liquor" had been defined, it would have found that the mere fact that a liquid beverage contains malt does not make it a malt liquor, unless it be also fermented and is alcoholic. We are asked to proceed in the same unhesitating manner and pronounce the beverage here involved a malt liquor in the face of every other decision where the question has arisen. Malt liquor is both alcoholic and fermented. While the generic term "malt liquor" includes both intoxicating and nonintoxicating liquors, this is because some liquors which are both fermented and contain alcohol have too small a percentage of alcohol to produce intoxication in any quantity which a person may be able to take at one time. This is the distinction found in many of the cases between intoxicating and nonintoxicating malt liquors. Life-staff, the liquid here involved, is concededly neither alcoholic nor fermented. It is, therefore, not a malt liquor. None of the decisions cited by either side save the *Lynch* case sustains the other view. On the contrary, so far as they have any bearing at all on the meaning of the term "malt liquor," they impliedly sustain the conclusion which we have reached. The *Lynch* case was appealed to the supreme court of the United States (*Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192), but that court, holding itself bound by the decision of the state court as to the scope of the Mississippi statute, did not pass upon the question whether Poinsetta was or was not

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a malt liquor. On the contrary, it held that it had no jurisdiction to pass upon that question.

In the following cases, cited by respondent, the sale of "malt liquor" was prohibited *eo nomine* by the statute involved. It was held that it was neither necessary to allege nor prove that the "malt liquor" in question in the given case was capable of producing intoxication. But in each of these cases the liquor involved was either admitted to be a "malt liquor," or admitted or proved to be a fermented liquor containing both malt and alcohol—hence was either admitted to be or proven to be such a liquor as is defined to be a "malt liquor" by the dictionaries. In *Fuller v. Jackson*, 97 Miss. 237, 52 South. 873, 30 L. R. A. (N. S.) 1078, same case on suggestion of error, 52 South. 876, the liquor was "malt ale." The agreed facts showed that it contained 2.71 per cent of alcohol by volume and conceded that it was a "malt liquor." The statute prohibited:

"Any vinous, alcoholic, malt, intoxicating, or spirituous liquors, or intoxicating bitters, or other drinks, which if drunk to excess will produce intoxication, . . ."

It was held that the liquor in question, being "malt liquor," was prohibited in terms whether it would in fact intoxicate or not.

In *Ex parte Lockman*, 18 Idaho 465, 110 Pac. 253, 46 L. R. A. (N. S.) 759, the liquor was "near beer." It was admitted that this near beer was a "malt liquor." The undisputed evidence showed that it contained 1.28 per cent alcohol and 7.1 per cent malt extract, but did not contain enough alcohol to intoxicate in the largest quantity which could be consumed at one time. The statute defined intoxicating liquors as follows:

"The words 'intoxicating liquors' as used in this act shall be deemed and construed to include spirituous, vinous, malt and fermented liquors, and all mixtures and preparations thereof, including bitters and other drinks that may be used as a beverage and produce intoxication."

The court said:

"The legislature likewise recognized the fact that vinous, malt and fermented liquors all contain, to some extent, the element of alcohol, although it may not be to such a degree as will produce intoxication. They therefore concluded when writing this statute defining the words 'intoxicating liquors,' to declare as a matter of law that all 'spirituos, vinous, malt, and fermented liquors' are intoxicating, irrespective of the amount of alcohol they may contain, and whether or not the particular kind of drink will in fact produce intoxication."

Held: The liquor in question being concededly a "malt liquor," was declared by the statute, as a matter of law, to be intoxicating liquor and prohibited.

In *Brown v. State*, 17 Ariz. 314, 152 Pac. 578, the liquor was called "Barette." It was conceded that it contained 1.96 per cent of alcohol by volume. It was conceded to have been made by the same process as beer, except that it was made from "barley, rice and hops," while beer is made from "barley and hops." The undisputed evidence showed that it was non-intoxicating in the largest quantity which could be drunk. The constitution of Arizona prohibits the manufacture or sale in that state of any "ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind." The case was tried to the court without a jury. The court said:

"We are forced to the conclusion that the word 'beer,' as used in the constitution, does not mean an intoxicating liquid only, but also a nonintoxicating fermented malted liquor, even though it be not intoxicating; that is, if the liquor be 'beer' as defined and historically known by the standard lexicographers and by the courts, its traffic is forbidden by the constitution. If the article involved in this case falls within the well-known definition of 'beer,' whether it be intoxicating or not, the appellant's act was criminal and subjects him to punishment."

Then quoting various definitions of "beer" from Century Dictionary, Webster's Dictionary, Standard Dictionary, Encyclopedia Britannica, Joyce on Intoxicating Liquors, and Woollen and Thornton on Intoxicating Liquors, the court

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held that the liquor, being beer, was prohibited *eo nomine* by the constitution whether intoxicating or not.

In *Douglas v. State*, 21 Ind. App. 302, 52 N. E. 238, the stuff sold was called "hop ale." The indictment charged a sale of "beer." There was evidence tending to show that it was in fact beer. There was also evidence that it was not beer and was not in fact intoxicating. There was no evidence that it was not of a malted and fermented quality. The statute declared "the words 'intoxicating liquor' shall apply to any spirituous, vinous, or malt liquor, or any intoxicating liquor whatever which is used or may be used as a beverage." The court instructed the jury that "'beer,' in the estimation of the law, is fermented liquor, made from any malted grain, with hops or other bitter flavoring matter." He also instructed that only a sale of "beer" as charged in the indictment could sustain a verdict of guilty, and that:

"It is claimed by the defendant that the liquid on the occasion referred to in the indictment was hop ale, which is not intoxicating. As heretofore stated, the question for you to determine is not whether hop ale was sold, or whether hop ale is intoxicating, or whether beer is intoxicating, but your attention must be directed to the fact whether the liquor called hop ale was, in fact, beer, and whether it was sold as charged in the indictment."

On appeal, these instructions were approved. The court said:

"If the court, as matter of law, must know that beer is a malt liquor, it is not necessary to a conviction for the jury, besides finding a sale of beer, to find also, as a matter of fact, that beer—that is, malt liquor—is intoxicating."

In *United States v. Cohn*, 2 Ind. Terr. 474, 52 S. W. 38, the liquor sold was "Rochester Tonic." The evidence showed that it was made in the same manner as beer and was, in fact, the second draw or brew from the mash from which beer had previously been made, and that it was simply beer with a less percentage of alcohol than is contained in ordinary beer. It

contained 3 per cent of malt extract and 1.73 per cent alcohol. It was admitted that Rochester Tonic was a malt liquor. It was conceded in argument that the stuff contained two per cent and under of alcohol and would not intoxicate. The statute prohibited the sale of "any vinous, malt or fermented liquors, or any other intoxicating drinks of any kind whatsoever." A prior statute had prohibited "ale and beer." The court said, at pages 500, 502:

"The evident object of Congress in making the change of phraseology in the statute from 'ale and beer' to 'any malt or fermented liquors' was not to exclude that which the old had included, but it was to include in the new law that which was excluded by the old, by using an expression broad enough to cover all forms and kinds of alcoholic drinks. . . .

"The law as it existed prior to the act of 1895 prohibited ale and beer in all of their forms. The first act passed afterwards, relating to the same conditions, prohibits malt liquors, ale and beer, in all of their forms. Did Congress intend to make an exception in the act of 1895? We think not, and therefore hold that malt and fermented liquors, when to be used as beverages or for drinks, are prohibited by the statute, in all of their forms, and the question as to whether or not they are intoxicating is immaterial."

In *Sawyer v. Botti*, 147 Iowa 453, 124 N. W. 787, 27 L. R. A. (N. S.) 1007, the action was to enjoin the sale of "justus beer," and was, of course, tried to the court. The evidence showed that, in the manufacture of justus beer, the same materials were used as in lager beer, and the process of malting and extracting were the same, except that the process of fermentation was arrested before any considerable amount of alcohol was produced, so that justus beer contained about one-half of one per cent of alcohol by volume, while lager beer contains three and one-half per cent of alcohol. The evidence further showed that justus beer was not intoxicating because no ordinary person could imbibe enough at one time to get sufficient alcohol to produce intoxication. The statute prohibited the sale of "intoxicating liquor," except as otherwise provided and defined that term to mean

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"alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever." The injunction was granted. On appeal the supreme court affirmed the decree, saying:

"We reach the conclusion without the slightest doubt that the beverage in question, *being a liquor manufactured from malted grain by a process involving fermentation*, no matter how slight the fermentation may be, and irrespective of the amount of alcohol which it actually contains, and also without regard to whether it is in fact intoxicating, is within the statutory description of liquors the sale of which is prohibited. It is conceded that the process of manufacture of justus beer is the same as that of lager beer, save that the fermentation is arrested at an earlier stage, and therefore less alcohol is contained in the product. We think that such liquor is 'beer' within the statutory definition, but, whether so or not, it is unquestionably a malt liquor." [Italics ours.]

The court thus clearly recognized the elements of *fermentation of malt and at least some trace of alcohol* as the essential and distinctive features of malt liquors, just as do all of the dictionaries, though the liquid in question was not intoxicating.

In *Luther v. State*, 83 Neb. 455, 120 N. W. 125, 20 L. R. A. (N. S.) 1146, the defendant was charged with selling without a license, "a certain malt and intoxicating liquor, to wit, malt tonic." The undisputed evidence showed that the liquor contained 1.1 per cent of alcohol and was "in the class of beers." The manufacturer's label stated that it contained "less than 2 per cent of alcohol" and was "brewed." The statute prohibited the sale of "malt, spirituous, or vinous liquors, or any intoxicating drinks," without a license. The court held that, as to the character of the liquor, it was not necessary to prove more than that it was a "malt liquor." In answer to the claim that there was no proof that it would intoxicate, the court said:

"At any rate, the law prohibits the sale of 'malt liquors' without a license, and we must obey its plain mandate. Alco-

holic beverages are under the ban of the law in some form or other in most civilized countries. They are known to be the cause of crime, destitution and pauperism. *Malt liquors used as beverages are known to contain that destructive ingredient.* It was proven upon the trial of this case that the beverage kept and sold by plaintiff in error contained it. The liquor sold by him was simply an effort to evade the law. The title of the act is 'An act to regulate the license and sale of malt, spirituous, and vinous liquors,' etc. The whole act is built upon that title. Malt liquors are as much within both the letter and spirit of the law as either of the other classes named. To say that the legislature intended to provide for the regulation and license of intoxicating malt liquors would require the same word to be used as defining the other classes, and would be legislating and reading into the statute a word which the legislature clearly intended should not be there. This is not the province of the courts." [Italics ours].

While the court did not define "malt liquor," it recognized that all malt liquors contain alcohol, thus agreeing with the definitions of the lexicographers, all of which, as we have seen, include the alcoholic element.

In *LaFollette v. Murray*, 81 Ohio St. 474, 91 N. E. 294, the liquor involved was "Friedon Beer." Defendant was sued for an occupation tax laid by statute on the trafficking in "spirituous, vinous, malt or other intoxicating liquors." The case was tried on an agreed statement of facts in which it was admitted that the stuff was "a malt liquor containing .47 of one per cent of alcohol, but not intoxicating." The court sustained a judgment for the tax, holding that the generic term "malt liquors" includes both nonintoxicating and intoxicating malt liquors. It did not attempt to define malt liquors because the liquor in question was admitted to be a malt liquor and contained alcohol.

In *State v. O'Connell*, 99 Me. 61, 58 Atl. 59, the defendant was indicted for being a common seller of intoxicating liquors. While the statute then in force in Maine is not set out in the opinion, the court said, "Rev. St. 1883, c. 27 § 33, amounts to a prohibition of the sale of malt liquor." The evidence

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showed a sale of "Uno Beer, brewed from malt, and containing 2.36 per cent of alcohol." On the trial, the court refused to instruct that the jury must find the liquor was intoxicating, but did instruct that "if you find beyond a reasonable doubt that the beer in question was brewed from malt it was a malt beer, and comes within the prohibition of the statute." The supreme judicial court held that this was not error, saying:

"The issue was whether the defendant sold malt liquor. If he did sell it, it was in violation of the statute, and it was not necessary, in order to establish his guilt, for the jury to go further, revise the judgment of the legislature and determine whether malt liquor was or was not in fact intoxicating. . . .

"The presiding justice was not bound to define the term 'malt liquor.' *State v. Starr*, 67 Maine 242; *State v. Wall*, 84 Maine 165. While the court should define to the jury legal terms to which the law has attached a specific meaning, it is not required to define words in common and ordinary use the definition and meaning of which jurors are presumed to understand as well as the court."

If, as the court says, the common meaning is the true meaning of the term "malt liquor," then where the question, as here, is presented as one of fact for the court, we can only take that definition on which the dictionaries in common use are unanimous, namely, an "alcoholic beverage brewed from malt" or "produced by fermentation from malt." See *Standard, Century and Webster's International Dictionaries* above quoted.

In *Feibelman v. State*, 130 Ala. 122, 30 South. 384, the cause was tried to the court without a jury. The liquor sold was "hop jack." The evidence showed that it contained from 1.75 to 2 per cent alcohol, and "was produced by fermentation of malted barley, diluted with water, and was therefore a malt liquor," but in potable quantities was not capable of producing intoxication. The statute prohibited "the selling of spirituous, vinous, or malt liquors, or intoxicating bitters or beverages." The supreme court sustained a conviction on the ground that the statute expressly prohibited the sale of

"malt liquor" and that the evidence showed that "hop jack" was a malt liquor. The court further said:

"We may, for all the purposes of this case, concede, without indicating any opinion upon the question, that the legislature may not, in the exercise of the police power, prohibit the sale of a malt liquor which is not intoxicating nor otherwise deleterious in any way where the sole purpose and object is the prevention of the sale of that particular character or quality of malt liquor. But it is common knowledge that most malt liquors are intoxicating and harmful when used excessively, and are capable of excessive use as a beverage. The sale of all such of course the legislature has the power to prohibit."

Clearly the evidence there brought the hop jack within the exact terms of the Century Dictionary definition, "an alcoholic beverage produced merely by fermentation of malt," and within the specific meaning of the definitions found in the Standard and Webster's International Dictionaries.

State ex rel. Guilbert v. Kauffman, 68 Ohio St. 635, 67 N. E. 1062, was a suit in mandamus to compel the enforcement of a statute imposing a tax, "on the business of trafficking in any intoxicating liquors, and also on the business of trafficking in spirituous, vinous, or malt liquors." The petition alleged that the liquor involved was "a malt liquor or beverage commonly known as 'Bishop Beer' . . . which malt liquor or beverage contains less than two per cent of alcohol and is not intoxicating." The court overruled a demurrer to the petition on the ground that: "The generic term 'malt liquor' includes both nonintoxicating and intoxicating malt liquors." The court did not define the term "malt liquors" because the demurrer admitted the allegation of the petition that the stuff was a malt liquor and contained alcohol.

In *Flanders v. Commonwealth*, 140 Ky. 38, 130 S. W. 809, the liquor involved was called "temperance beer" or "Dr. Fizz." It was admitted to contain one per cent of alcohol. Witnesses who drank it testified that:

"The liquor looked like beer, smelt like beer, foamed like beer, and tasted like beer. Several of them testified that they

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had drank beer many times, one of them that he had been a barkeeper, selling beer for some years, and that in their opinion the liquor was beer, somewhat diluted."

Defendant and the manufacturer testified that it was merely a carbonated water with one per cent of alcohol added. The statute prohibited the sale of "spirituous, vinous and malt liquors." The court took judicial notice that beer is a malt liquor, and instructed the jury that if it found that the decoction in question was "ordinary beer, a malt liquor," defendant should be found guilty. The appellate court approved this instruction, saying:

"As, therefore, the statute in terms prohibits the sale of malt liquors in local option territory, it is enough to inquire whether the liquor sold is malt liquor; if it is, the guilt is fixed. Whether it intoxicates some people or not, or is only a mild intoxicant, or whether defendant believed that it was an innocent soft drink, are immaterial."

In *Commonwealth v. Goodwin*, 109 Va. 828, 64 S. E. 54, one statute, known as the "Byrd law," a state revenue act, permitted the sale of "malt beverages" which it defined as:

"The product of a brewing plant, or brewery, and shall, as to its composition, comply with the standards now, or as may hereafter be prescribed by the pure food commissioner of the United States, but shall be nonintoxicating and in no event contain in excess of two and one-quarter *per cent.* in volume of alcohol."

Another statute prohibited licensing the sale of "ardent spirits, malt liquors, or any mixture thereof or any bitters containing alcohol" in any town except upon the written consent of the town council. The court held that "malt beverages" as defined in the first statute were "malt liquors" within the meaning of the second statute. Since "brewing" essentially involves fermentation it is clear that the definition of "malt beverages" in the Byrd law brings such beverages within the definition of "malt liquor" as found in all the dictionaries.

In *State v. Walder*, 83 Ohio St. 68, 93 N. E. 531, the statute defined "intoxicating liquor" as including "any distilled, malt, vinous or any intoxicating liquor whatever." The liquor sold was "near beer." The accused testified that it was made as other beer, only weaker; that it was then boiled so as not to contain any alcohol; that "sugar, etc." was then added and the mixture was "carbonated;" that "if you keep it in a warm place, it would generate alcohol right away," but if kept cool "it might go two or three weeks . . . and never get alcohol;" that this was why he did not ship it or sell it except on his own place; that in the beer he sold at the time in question there was probably .2 of one per cent of alcohol. He admitted that, if left standing, it would become intoxicating. The court held that the concoction was a "malt liquor," and was hence, in law, an intoxicating liquor because the legislature had defined it so. It is clear that it was brewed from malt and contained at least a trace of alcohol, as admitted by the defendant, and would soon develop sufficient alcohol to become intoxicating. It plainly fell within the standard definition of malt liquor as an "alcoholic beverage brewed from malt." The facts showed a plain attempt to evade the statute by selling a potential beer.

The case of *Campbell v. Thomasville*, 6 Ga. App. 212, 64 S. E. 815, has no bearing upon the case before us. The court there defines "near beer" as:

"A term now of general currency in this state, and perhaps elsewhere, used to designate any and all of that class of malt liquors which contain so little alcohol that they will not produce intoxication, even though drunk to excess. It includes all malt liquors which are not within the purview of the general prohibition law."

The case merely held that, because its sale was not prohibited by the general statutes, it could not be prohibited by a city ordinance, but because it was an imitation and substitute for beer and liable to be used as a cover for the sale of real beer, it was within the police power of the city

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to regulate its sale by ordinance. This is elementary. In fact it is admitted in the case before us that the sale of beverages containing no alcohol whatever may be by state statute absolutely prohibited in the exercise of the police power as an aid to the enforcement of the prohibition of alcoholic beverages. But our statute contains no such provision unless every liquid containing malt, whether fermented or not and whether containing alcohol or not, is a "malt liquor," which is the real question here involved.

In *People v. Kinney*, 124 Mich. 486, 88 N. W. 147, the court merely held that fermented cider was a "fermented liquor" and hence prohibited by the statute, whatever the degree of fermentation.

We shall not review in detail the other cases cited by respondent involving statutes prohibiting the sale of "cider" *eo nomine*. They merely hold that cider being in terms prohibited, the courts will not inquire whether the given cider is or is not "sweet" or "hard," fermented or unfermented, new or old, intoxicating or nonintoxicating. They throw no light on the question before us. *Commonwealth v. Dean*, 14 Gray (Mass.) 99; *State v. Frederickson*, 101 Me. 37, 63 Atl. 535, 115 Am. St. 295, 6 L. R. A. (N. S.) 186; *State v. Spaulding*, 61 Vt. 505, 17 Atl. 844.

We want it distinctly understood we do not hold that the statute does not prohibit the manufacture and sale of a malt beverage of such composition that of itself, under proper conditions, will generate alcohol. We hold just the contrary. Such a liquor would be potentially a malt liquor. In the language of the statutes, it would contain "intoxicating properties." Its manufacture or sale would be a palpable evasion of the statute. *State v. Walder, supra*. But the liquid here involved, it is admitted, "is entirely free from alcohol" and "does not in fact contain intoxicating properties." The admission clearly negatives the idea that it will of itself generate any alcohol whatever. It is not even claimed by the state that it will. We have, therefore, neither allegation nor proof

to bring the beverage here involved within any definition of malt liquor, actual or potential.

We further want it distinctly understood that we are not giving to the stuff called "Lifestaff" a certificate of character. *We are merely passing on the admitted facts now before us.* If, in any future case, it shall be either admitted or proved that "Lifestaff," or any other beverage by whatever name called, is in fact a malt liquor, either actual or potential, as the dictionaries, text books and courts have defined the term "malt liquor," then, in such a case, it must be held an "intoxicating liquor" as defined in the statute, and hence prohibited.

Neither do we hold that liquids absolutely harmless, wholly free from alcohol and wholly free from intoxicating properties of any kind, might not be directly prohibited, or might not be conclusively defined as intoxicating liquors and so prohibited, by a law so declaring in order to aid in the enforcement of the purpose of the prohibition law. The legislature, or the people in a legislative capacity, have the undoubted power to prohibit any liquid, however harmless in itself but which might be used as a cover for the sale of the harmful liquors, or to prohibit all imitations or substitutes for intoxicating liquors, however harmless separately considered. *But we have no such statute and this court cannot pass one. It cannot legislate.* Experience in the enforcement of the law as it is now written may eventually show such a need, but this court cannot supply it. The law as it now is contains no such provision, either in terms or by any possible implication, however liberally construed.

Again, we do not hold that the prohibition law as it now reads prohibits nothing but liquors or liquids capable of producing intoxication when taken to capacity. On the contrary, we hold that every malt liquor, though containing only a trace of alcohol, is in terms prohibited because it is a "malt liquor" under the common meaning of that term as defined

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by every standard dictionary and every court which has attempted to define it.

We merely hold that a liquid containing malt, if unfermented and containing no alcohol whatever, is not a "malt liquor" as defined by any standard dictionary of our language, or as defined by any text book, or as defined by any court which has attempted to define the term, to which our attention has been directed or which, after many days of careful search, we have been able to find. In this we are not merely following precedent. We are simply giving to the term "malt liquor" the only meaning that it has in our language. We are not even selecting between a primary and secondary meaning. We are taking the only meaning which the words have. It is admitted that the liquid here involved does not come within that meaning. We are bound by the admitted facts.

The judgment is reversed.

MORRIS, C. J., PARKER, MOUNT, MAIN, HOLCOMB, and CHADWICK, JJ., concur.

[No. 13444. Department One. November 23, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Anna
Criswell, Appellant*, v. BOARD OF TRUSTEES OF
THE FIREMEN'S RELIEF AND PENSION
FUND, *Respondent*.¹

MUNICIPAL CORPORATIONS—OFFICERS AND EMPLOYEES—FIREMAN'S PENSION—ADMINISTRATION—POWERS OF PENSION BOARD—MANDAMUS. Under Rem. 1915 Code, § 8073, subd. 4, providing that the board of the fireman's relief fund shall hear and decide all applications for relief or pensions under the act and that its decisions on such applications shall be final and conclusive on the courts, mandamus does not lie to inquire into the correctness of a ruling of the board or to review its action in denying an application for permanent relief under the act.

SAME. The act for the relief and pension of firemen, Rem. 1915 Code, § 8061 *et seq.*, confers upon the pension board power to determine who are entitled to a fixed pension, as well as to determine who are entitled to temporary relief.

SAME—OFFICERS AND EMPLOYEES—FIREMEN'S PENSION—CONSTITUTIONAL LAW—VESTED RIGHTS. The act for the relief and pension of firemen is not a vested right subject to determination by the courts, since the legislature vested the pension board with full power and authority to determine any inquiry as to who are entitled to the benefit of the act, and made its conclusion final; and the legislature had the power to pass such act.

Appeal from an order of the superior court for Pierce county, Clifford, J., entered May 25, 1915, dismissing an application for a writ of mandamus to compel the payment of an insurance benefit under the fireman's pension act, after a hearing before the court. Affirmed.

Wesley Lloyd, for appellant.

T. L. Stiles and *Frank M. Carnahan*, for respondent.

FULLERTON, J.—The statute (Rem. 1915 Code, § 8061 *et seq.*) authorizes the creation of a firemen's relief and pension fund. For the maintenance of the fund, it provides that

¹Reported in 161 Pac. 361.

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the treasurer of the city shall retain from the pay of each and every member of the fire department a sum equal to one and one-half per centum of the monthly compensation paid each such member, and authorizes and empowers the city council of any city to levy, in the annual tax levy of such city, a tax not to exceed one-half of one mill until such time as the fund shall reach the sum of \$25,000; no tax to be levied thereafter until the fund shall be less than that sum.

The statute defines the beneficiaries of the fund. It provides for the payment of a pension to every fireman who shall become physically or mentally disabled while in, or in consequence of, the performance of his duty as such fireman, the payment of hospital expenses and nursing for sick and injured fireman, and for the payment to the widow or certain named beneficiaries of a fireman dying from natural causes the sum of one thousand dollars.

A board, to consist of the mayor and three members of the common council of the city, together with six members of the fire department, is created for the administration of the fund. After defining somewhat minutely the powers and duties of the board, the statute specifically prescribes:

"Said board shall hear and decide all applications for such relief or pensions under this chapter and its decisions on such applications shall be final and conclusive and not subject to revision or reversal except by the board." Rem. 1915 Code, § 8078, subd. 4.

William A. Criswell, the husband of the appellant, became a member of the fire department of the city of Tacoma on June 1, 1910. In the early part of the year 1912, he began to show symptoms of incipient tuberculosis of the lungs, and was granted a leave of absence on full pay for recuperation. On July 11, 1913, he was reported as being cured by the physician of the board, at which time he returned to active duty. In December, 1913, he again became ill, and was subjected to an examination by the physician, who reported to the board under date of January 5, 1914, that he had again

become infected with tuberculosis and was unable to continue his work as an active fireman. He was then placed by the board upon the pension roll at half pay, and continued thereon until his death from the disease, which occurred on February 14, 1915, performing in the meantime no active service in the fire department.

After her husband's death, the appellant, as his widow, filed with the board her claim for the sum of one thousand dollars, payable by the terms of the act to the widow of a fireman who has served as such for two years, and dies from natural causes. Her claim was disallowed by the board, whereupon she applied for a writ of mandamus in the superior court of Pierce county to enforce an allowance of the claim. The court denied the application on the ground that the action of the board thereon was final and conclusive. From its order made in the premises, the widow appeals.

The conclusiveness of the order of the board of pensions is urged in this court. The contention we think must be sustained. It is within the power of the legislature, when enacting a statute creating a new right with its remedy, to vest in some board or person power to adjudicate all matters arising under the statute, and to make such adjudication final and conclusive.

A case in point is *State ex rel. Lynch v. Board of Trustees of Fireman's Pension & Relief Fund*, 117 La. 1071, 42 South. 506. The court there had under consideration a statute similar in its provision to the statute here in question. The board of pensions was given exclusive control and management of the pension fund with power to hear and decide all applications for relief or pensions under the statute, and its decisions thereon were made final and conclusive, and not subject to review or reversal except by the board. On an attempt to review an order of the board, the court said:

"The question is whether this court can in a mandamus proceeding inquire into the correctness of the rulings of the defendant board. The statute itself answers, 'No.' Our

former opinion practically nullifies that provision of the act which declares that the decisions of the board shall not be subject to review or reversal, except by the board itself. The act itself provides for the gratuitous distribution of a fund to be created out of the revenues of the state, and in our opinion it was competent for the legislature to annex the condition that the decisions of the board in all applications shall be final and conclusive."

To the same effect is *Karb v. State*, 54 Ohio St. 383, 43 N. E. 920. It is there said:

"It is a rule of construction, that where a new right with its remedy is given by statute, and there is no provision for a review or appeal from the determination of those who administer the statute creating the right, such determination is usually final. In such case an adverse decision cannot be overcome by appeal or original petition to a court of justice. Had the legislature intended that the cause of the disability should be ascertained by litigation in court, it would have made provision therefor in the statute. The theory of the act seems to be that the board of trustees can be trusted to do full justice in each case."

See, also, *People ex rel. Bliel v. Martin*, 131 N. Y. 196, 30 N. E. 60; *Friel v. McAdoo*, 101 App. Div. 155, 91 N. Y. Supp. 454.

The appellant contends that the statute properly construed gives the pension board exclusive jurisdiction over matters of temporary relief and pensions only, and does not include the claim made by the appellant. But a reading of the act convinces us that all questions concerning the administration of the act were vested in the board; the power to determine who were entitled to the fixed sum, as well as to determine who were entitled to temporary relief or to pensions under the act.

The further claim that the right to the relief demanded is a vested right and thus subject to a determination by the courts is also without foundation. Whether the right was vested is subject to inquiry, and since the legislature has vested the board of pensions with full power and authority to determine the inquiry, its conclusion on the question is as

final as it is on any other matter of which it is granted complete jurisdiction.

Our opinion is that the application was properly denied, and that the judgment of the trial court should be affirmed. It is so ordered.

MORRIS, C. J., and MOUNT, J., concur.

[No. 13486. *En Banc*. November 28, 1916.]

In the Matter of WESTERN AVENUE.

CANNIE FORD TRIMBLE *et al.*, *Appellants*, v. THE CITY OF SEATTLE, *Respondent*.¹

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—BENEFITS—REVIEW. The action of eminent domain commissioners in assessing property for benefits from improvements more than a mile distant will not be disturbed on appeal where the evidence as to the fact of benefits was conflicting; as that was a question of fact which cannot be reversed except in case of fraud, mistake or arbitrary action amounting to an abuse of discretion.

SAME—PUBLIC IMPROVEMENTS—ORDINANCE—IMPLIED REPEAL—EMINENT DOMAIN—ABANDONMENT OF PROCEEDINGS. Where, after the passage of an ordinance for a street improvement and condemnation and award thereunder, the city passed a second ordinance providing for an additional widening of one of the streets and a different system of grades but condemnation proceedings thereunder were abandoned, the second ordinance does not repeal the first ordinance by implication, where there was no such intention, and the two months within which the city could abandon the first condemnation under Rem. & Bal. Code, § 7816, had expired before the second ordinance was passed.

SAME—PUBLIC IMPROVEMENTS—ASSESSMENT—STATE LANDS—STATUTES—"LOCAL IMPROVEMENTS." Rem. 1915 Code, § 6875, providing that all city lands of the state except tide lands may be assessed for the cost of local improvements specially benefiting the same, authorizes an assessment for street improvements against a state armory site situated on upland in a city; "local improvement" including improvements made upon streets and not upon the land itself.

¹Reported in 161 Pac. 381.

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SAME—PUBLIC IMPROVEMENTS—ASSESSMENT—NOTICE. Under Rem. 1915 Code, § 6877, providing that no city shall have jurisdiction to make a local improvement or levy an assessment against state lands until notice of the making of such proposed improvement and the fixing of the time for hearing and confirming the same be served upon the state land commissioner, it is sufficient that notice was given when it was determined that the state land was specially benefited and the state appeared and was heard in opposition to the assessment.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 27, 1915, confirming an assessment roll for a public improvement. Affirmed.

Kerr & McCord and *Peters & Powell*, for appellants
Trimble et al.

The Attorney General and *L. L. Thompson, Assistant*, for
appellant State of Washington.

Hugh M. Caldwell, Walter F. Meier, and Howard A. Hanson, for respondent.

MOUNT, J.—This is an appeal from a judgment of the superior court for King county confirming an assessment roll prepared by the board of eminent domain commissioners of the city of Seattle. It appears that, on the 10th day of January, 1910, the city council of the city of Seattle passed ordinance No. 23,040 providing for the laying off, extending, and establishing of Western avenue from West Denny Way to Elliott avenue, and of Queen Anne avenue from West Denny Way to Western avenue, in Seattle, and providing for the condemnation, appropriation, taking, and damaging of land and other property necessary therefor; providing for the changing and establishing of the curb grades of Western avenue and Western avenue extended, and approaches thereto, from Eagle street to Elliott avenue; of West Denny Way from Western avenue to First avenue north; of Queen Anne avenue from West Denny Way to West John street; of West John street from Western avenue as extended to Queen Anne avenue; of First avenue west to Western avenue as extended,

and connecting alleys; providing for the condemnation, appropriation, taking and damaging of land and other property necessary for the grading and regrading of said avenues, streets, approaches thereto, and connecting alleys, in conformity with such established grades; and for the construction of all necessary slopes for cuts and fills upon the property abutting upon said avenues, streets, approaches thereto, and connecting alleys, and providing that payment for such improvement be made by special assessment upon the property specially benefited and in the manner provided by law, and that any part of the cost of said improvement not finally assessed against the property specially benefited be paid from the general fund of the city of Seattle.

Pursuant to the provisions of this ordinance, the city instituted a condemnation proceeding, wherein a judgment was entered on May 25, 1912, on awards theretofore made by a jury impaneled in said cause, in the sum of \$107,676.34 in favor of the property owners affected.

On December 24, 1912, the city of Seattle filed a supplemental petition praying that an assessment be made for the purpose of raising the amount necessary to pay the condemnation damages so awarded. This petition was granted, and the board of eminent domain commissioners of the city was directed to prepare an assessment roll covering the property deemed to be specially benefited. The board of eminent domain commissioners did so and assessed \$98,201 of the costs of the improvement to the property found to be specially benefited, and \$37,206.42 was charged against the general fund of the city.

The assessment roll was filed by the board of eminent domain commissioners on January 19, 1915, and included properties located on the four corners of Pike street and Second avenue in Seattle. Objections to the confirmation of the assessment roll were filed on February 16, 1915, by the owners of the property on the corners of Pike street and Second avenue. A hearing was had upon these objections on Sep-

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tember 27, 1915. The court entered an order confirming the assessment as against these properties, and the owners thereof have appealed from that order.

It is argued, first, that the properties of the appellants were not specially benefited, and, in fact, not benefited at all; and second, that the ordinance by authority of which the assessment roll was made up had, prior to the time the same was prepared, been repealed, and that the casting of the assessment roll was, therefore, without warrant of law. The state insists that state lands may not be assessed by a municipal corporation for the purpose of paying verdicts rendered in condemnation proceedings. We shall briefly notice these contentions in their order.

Upon the first question, it is argued that, because the property of these appellants at Second avenue and Pike street is a mile away from the improvement, there is no special benefit to the property of these appellants. It is at once apparent that this is a question of fact; and evidence was introduced by the appellants to the effect that there was no special benefit to the property by reason of the fact that the improvement would in no way tend to benefit their property. Evidence was offered on behalf of the city to the effect that the appellants' property is located about the civic center of the city, and that this improvement would afford a better way for travel to the appellants' property; and that the result would be more people would pass by the appellants' property after the improvement than before. It is not claimed, as we understand the appellants, that there was any fraud upon the part of the eminent domain commissioners in levying the assessment. But it is claimed that, because of the great distance from the appellants' property to the improvement, there can be in fact no special benefit thereto. This, it seems to us, is a question of fact to be determined by the board of eminent domain commissioners, whose decision is reviewable by the superior court. That court concluded, after hearing all the evidence, that there was a special benefit. This court has

held upon questions of this character that a conflict in the evidence is not sufficient to justify a reversal of the lower court, and that the order of the lower court confirming the action of the eminent domain commissioners will not be reversed except in cases of fraud, mistake, or arbitrary action amounting to an abuse of discretion, or when based upon a fundamentally wrong basis, which must clearly appear from the evidence. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *In re Seattle*, 46 Wash. 63, 89 Pac. 156; *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211, and cases therein cited.

We are satisfied from a careful review of the evidence and the entire situation presented in this improvement, that there was no arbitrary action on the part of the eminent domain commission, that there was no fraud, and no action amounting to an abuse of discretion, and that the assessment was not based upon a fundamentally wrong basis.

It is next argued that ordinance No. 23,040 was repealed by ordinance No. 30,864. It appears that, after ordinance No. 23,040 had been passed, and condemnation proceedings had thereunder, and award of judgment in condemnation had been made, the city thereafter passed ordinance No. 30,864, providing for an additional widening of Western avenue from Eagle street to Fourth avenue west and Elliott avenue, and providing for the condemnation and appropriation of other property necessary therefor. This ordinance provided for the establishment of certain curb grades and other improvements upon Western avenue. Ordinance No. 23,040 was not repealed by the later ordinance. The later ordinance, as we understand the record, provided for a wider street upon Second avenue and a different system of grades. After the passage of the later ordinance, and after condemnation proceedings had been instituted, the city passed another ordinance abandoning the proceedings under ordinance No. 30,864. The proceedings which had been instituted under that ordinance were dismissed and the costs thereof paid by the city.

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The appellants contend that the second ordinance repealed the first ordinance by implication because the latter ordinance covered the subject-matter of the earlier ordinance. We think it is plain that the second ordinance simply contemplated a more extensive improvement upon these avenues than the first ordinance. Some changes would have been made if the second ordinance had been carried out according to its intention. But it seems clear to us that there was no intention on the part of the city to repeal the former ordinance. The whole intention was, as we have before stated, to make a more extended improvement by another change of the grades which were made by the first ordinance, and a double roadway in addition to that provided for in the first ordinance. There was clearly no intention on the part of the city to abandon the condemnation proceedings under the first ordinance. In fact and in law, the time had expired within which the city could abandon the first condemnation proceedings under the first ordinance. Laws of 1907, p. 337, § 49 (Rem. & Bal. Code, § 7816). The two months' time had elapsed after the first ordinance had been passed. The awards in condemnation had been made and entered before ordinance No. 30,864 was passed. Under these facts, the city could not abandon the proceedings under the first ordinance. *State ex rel. Murray v. Herdlick*, 73 Wash. 301, 131 Pac. 1139; *Spokane v. Pittsburg Land & Imp. Co.*, 73 Wash. 693, 132 Pac. 633. We are satisfied that the second ordinance was not intended to repeal the first ordinance, and that the proceedings under the second ordinance were abandoned and, therefore, did not affect the proceedings which were had under the first ordinance.

It is argued on the part of the state that the assessment against the armory site was not authorized, and was therefore invalid. The statute provides with reference to the assessment of state lands for benefits, at Rem. 1915 Code, § 6875, that all lands of the state, except tide lands, situated within the limits of any incorporated city, "may be assessed

and charged for the cost of local improvements specially benefiting such lands which may be ordered by the proper authorities of any such city."

It is conceded that these lands are not tide lands. The lands upon which the armory site is situated are uplands within the corporate limits of the city, and, therefore, under this provision, it seems are liable for assessment for the benefits by direct authority of the statute.

It is argued by the state that the words "local improvements" mean "actual physical improvement of the land by the formation of an improvement district under the local improvement act." But we are satisfied that this is too narrow a construction of the words "local improvements" if improvements are made upon streets and not upon the land itself, which improvements may benefit the state lands. We are satisfied it was the intention of the legislature that state lands should be liable for the special benefits accruing to the state lands by reason of the improvement.

In 1 Page and Jones, *Taxation by Assessment*, § 286, it is said:

"The term 'local improvement' thus used has substantially the same meaning as that which is already discussed. It is said to be a public improvement by which the realty adjoining or near the locality of such improvement is especially benefited, or one which is confined to a locality and enhances the value of adjacent property in addition to the benefits which it confers upon the public generally. 'A local improvement within the meaning of the law is an improvement which by reason of its being confined to a locality enhances the value of property situated within the particular district, as distinguished from benefits diffused by it throughout the municipality.'"

We think this is the correct rule.

It is further argued by the *Attorney General* that the provisions of Rem. 1915 Code, § 6877, which make it the duty of the city treasurer, upon approval and confirmation of the assessment roll for any local improvement, to certify a state-

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ment of the lands and the amount thereof to the commissioner of public lands, or to the state board of control, are limited by the following proviso:

"Provided, that no city . . . shall have jurisdiction to make such local improvement or levy an assessment against any of the lands of the state of Washington until notice of the making of such proposed improvement and the fixing of the time for hearing and confirming the same by the city . . . has been served upon the land commissioner or the board of control, as the case may be. . . ."

It appears that no notice of *intention* to make the proposed improvement was served upon the land commissioner or the board of control prior to the passage of the condemnation ordinance; and it is claimed, for that reason, the city had no jurisdiction to make an assessment against the property of the state. It also appears that, before the assessment was made, the state had notice thereof, and appeared at the hearing upon the assessment roll and objected thereto. At the time the ordinance was passed, it was apparently not known that the improvement would affect the property of the state. But when it was determined that the property of the state was specially benefited, notice was given to the state, or at least the state appeared at the hearing upon the assessment roll and objected thereto upon the ground that the city had no authority to levy an assessment for special benefits upon state lands. We think this was sufficient notice under the statute. All rights of the state were preserved, and it had an opportunity to be heard, and was heard upon its liability to pay for the special benefits, or to object to the assessment for special benefits upon its property.

We find no error in the record. The judgment will therefore stand affirmed.

MORRIS, C. J., ELLIS, MAIN, and HOLCOMB, JJ., concur.

[No. 13063. *En Banc*. December 5, 1916.]

H. T. GILSON, *Respondent*, v. WASHINGTON WATER POWER
COMPANY, *Appellant*.¹

CARRIERS—TAKING ON PASSENGERS—NEGLIGENCE—CLOSING DOOR—INSTRUCTIONS—HARMLESS ERROR. Where, in an action for injuries sustained in attempting to enter a pay-as-you-enter car, there was a conflict in the evidence as to whether the car was standing still with the door open as an invitation to enter, or whether the car had started with the door closed, error in instructing that the defendant owed the duty to use the highest degree of care, is not prejudicial, taken in connection with other instructions immediately following telling the jury that closing the door upon the plaintiff after he had started to enter was negligence, but that plaintiff could not recover if he tried to enter after the door was closed; since the jury would not receive the impression that the high degree of care first stated was required unless they found that the car door was open under such circumstances as to be an invitation to enter.

APPEAL—REVIEW—INSTRUCTIONS—REQUESTS. It is not error to refuse to give requested instructions that are covered in the general charge.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE. In an action for personal injuries in which it was shown that plaintiff required crutches for walking, a new trial for newly discovered evidence is properly refused upon a showing by affidavits and photographs that, seventeen days after the trial, the plaintiff was walking with a cane, and some of the medical witnesses were of the opinion that he had been "faking his injuries"; it appearing from the affidavit of plaintiff and his physician that he had been advised to try using a cane and could walk only short distances without crutches; since the newly discovered evidence was largely cumulative and would not likely change the result, and the amount of the verdict plainly indicating that the award was not for total or permanent disability.

Appeal from a judgment of the superior court for Spokane county, Clifford, J., entered May 4, 1915, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a passenger on a street car. Affirmed.

Post, Avery & Higgins, for appellant.

Plummer & Lavin, for respondent.

¹Reported in 161 Pac. 352.

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Opinion Per PARKER, J.

PARKER, J.—This is an action to recover damages for personal injuries which the plaintiff, H. T. Gilson, alleges were received by him as the result of the negligence of one of the defendant's conductors occurring while the plaintiff was attempting to enter one of defendant's street cars as a passenger. Trial in the superior court resulted in verdict and judgment in favor of the plaintiff awarding him \$3,500 damages, from which the defendant has appealed to this court.

Appellant owns and operates a street railway system in the city of Spokane. Its street car which respondent was attempting to enter at the time he was injured had a closed rear vestibule, with two doors on the right side thereof, one for passengers entering, and the other for passengers leaving the car. It was a pay-as-you-enter car. It was the duty of the conductor not only to collect fares from passengers as they entered and passed through the vestibule, but also, by means of a lever, to open and close the doors for passengers as they entered and left the car. Respondent claims that, while the car was standing still with the doors open as an invitation for passengers to enter, and while he was following other passengers who were entering the car, he attempted to enter through the proper door as a passenger; and that, when he had proceeded to the extent of placing one or possibly both feet on the step and taking hold of the car or hand hold at the side of the opening occupied by the door when closed, the conductor suddenly closed the door, striking respondent and causing him to fall backward upon the pavement of the street, resulting in the injuries for which he claims damages.

That respondent was seriously injured by his fall, seems amply supported by the evidence, though the evidence is conflicting as to the extent of the injuries in so far as the opinion testimony of physicians given upon the trial is concerned. Respondent's injuries were received on November 17, 1914.

On March 17 to 19, 1915, just four months thereafter, the trial occurred. Respondent suffered severe pain during the early part of this period and had suffered pain more or less up until the time of the trial. His lower extremities were partially paralyzed, resulting, in the opinion of his physician, Dr. Rigg, from a hemorrhage of the spinal cord. His recovery was slow. There was loss of power of locomotion. From an examination of respondent, made a day before the commencement of the trial, Dr. Rigg testified as his opinion that respondent did not then have the use of his lower extremities to the extent of more than two-thirds of their normal use, and that the period that condition would continue to exist was indefinite. Respondent testified that it was then necessary for him to use crutches to walk because, "My legs give out altogether when I go to walk if I have not got crutches to support me." Respondent was, at the time, thirty-six years old, was a railway trainman, and capable of earning from \$100 to \$125 per month.

It is contended in appellant's behalf that the trial court erred, to appellant's prejudice, in giving to the jury the following instruction:

"Instruction No. 2. . . . The defendant in this case is a common carrier and owed to the plaintiff the duty of using the highest degree of care consistent with the reasonable operation of its cars for his safety not only while riding upon its cars, but in entering or alighting therefrom; and for any injury which he may have sustained by the failure on the part of the defendant company to perform this duty he would have a right of recovery in this action."

This, it is insisted, was erroneous, in that the language of the instruction assumes that the relation of carrier and passenger existed between appellant and respondent at the time he was injured, calling for the highest degree of care on the part of the conductor. It may be conceded that, standing alone, this instruction seems to have that meaning and would, to that extent, invade the province of the jury; since

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there is room for difference of opinion upon the question of respondent's being then a passenger, in view of the conflict in the evidence as to whether or not the car was standing still and the door open inviting passengers to enter. However, the court's instructions continue as follows:

"Instruction No. 3. In the case now on trial, if you find from the evidence that the plaintiff attempted to board the car at a time when the door of the car was open and other passengers were entering, and at the time the conductor in charge of the car either saw the plaintiff attempting to enter the car, or could have seen the plaintiff if he, the conductor, had used the degree of care that a reasonably careful and prudent man would have exercised under the same or similar circumstances; and you further find that the conductor closed the door of the car while the plaintiff was so trying to enter the car and thereby caused the plaintiff to fall on the paved street substantially as alleged in his complaint, under such circumstances the defendant would be guilty of negligence; and if you further find that the plaintiff himself was not guilty of any negligence which contributed to his accident, then your verdict should be for the plaintiff.

"Instruction No. 4. If on the other hand you find from the evidence that the conductor in charge of the car had closed the door of the car when the plaintiff attempted to board the car, and that he fell upon the street and sustained his injuries on account of his own negligence in attempting to get upon the car at a time when the door was closed, then the plaintiff was guilty of contributory negligence and your verdict should be for the defendant."

Reading all of these instructions together, we think that the jury would not likely receive the impression that the high degree of care stated in instruction No. 2 was required of the conductor unless they found that the car door was open under such circumstances as to in effect be an invitation to respondent to enter the car as a passenger, and he was attempting to so enter. Of course, if the jury so found, it was not error to have them so measure the degree of care required of the conductor. We conclude that this claimed error was not prejudicial to appellant's rights, in view of

all of these instructions. *Morran v. Chicago, Milwaukee & Puget Sound R. Co.*, 70 Wash. 114, 126 Pac. 73.

Some contention is made in appellant's behalf that the giving of the fourth instruction was erroneous, but we are clearly of the opinion that it was not so. It is also complained that the refusal of the court to give a certain requested instruction was error. An examination of this requested instruction, however, convinces us that it was given in substance by the court, and that, therefore, the refusal to give it in the exact language requested was not prejudicially erroneous.

One of the grounds of appellant's motion for a new trial is newly discovered evidence; and error is claimed in its behalf because the trial court did not grant a new trial upon this ground. Affidavits in support thereof were filed tending to show respondent's condition on April 5th and a few days following, which was seventeen days after the trial. Three photographs were taken of respondent on April 6th and one on April 9th, at the instance of appellant, without his knowledge, while upon the streets of Spokane. These photographs show him apparently walking and also standing, using a cane, and without the use of crutches. Thomas Aston, a claim agent of appellant, stated in his affidavit that he saw the plaintiff on April 5th walking on a street in Spokane using only a cane. He does not describe the nature of respondent's walk, whether it appeared to be natural, laborious or painful. Dr. O'Neill, who had been a witness for appellant upon the trial, stated in his affidavit that, at the time of the giving of his testimony and ever since, he was and has been of the opinion that respondent was "faking his injuries;" that, on April 6th, he saw respondent walking without the use of crutches, but with a cane, and that his gait or walk was materially different from that which he used at the time of the trial while walking with crutches; that "his style of walking was that of limping a little as though he had a sore foot," and that his, O'Neill's, former opinion was confirmed by what he saw of respondent's action

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at that time. Dr. Eikenbary, who was a witness for appellant upon the trial, stated in his affidavit, as he did at the time of giving his testimony, that he was of the opinion that respondent could use his legs as any normal man could if he desired so to do; that he had no injury which interfered with such use; that he was "faking his injuries;" that he, Eikenbary, examined the photographs taken of plaintiff since the trial and that his opinion is confirmed by the photographs. Dr. Weisman, who was a witness for appellant upon the trial, stated in his affidavit that, at the time of giving of his testimony and ever since, he has been of the opinion that respondent was "faking his injuries," and that such opinion was confirmed by an examination of the photographs taken of respondent since the trial. Clyde Higgins in his affidavit states that he saw respondent April 9th walking without crutches using a cane only, but does not describe the nature of respondent's walk or the apparent effort required by respondent when walking with a cane. Dr. Rigg, the physician who attended respondent since he was injured and who was a witness for respondent upon the trial, states in his affidavit that, on about April 5th, he advised respondent to try to walk some and use his feet without the aid of his crutches temporarily, for short periods of time when he could do so; and also states the opinion that respondent "is not faking his injuries." Respondent in his affidavit states that he did walk short distances, on April 5th and thereafter at times, without crutches, using a cane, but that he could so walk only a short distance at a time and required prolonged rests; that he has not abandoned his crutches and that it is still necessary for him to use them practically all of the time. The photographs taken of respondent furnish but little evidence as to the ease or effort with which respondent walked at those times. The reason of this manifestly is that they are not "moving pictures."

The substance of the showing made by these affidavits and photographs is, as we view it, that seventeen days after the

trial respondent could walk to some extent with a cane and without the use of crutches; that such walking was exhausting to him and that he still required the use of his crutches most of the time and that his condition had possibly somewhat improved; but this showing does not, we think, furnish any substantial ground for the conclusion that respondent was "faking his injuries" at and prior to the time of trial, or that he was not severely injured substantially to the extent claimed by himself and his physician, as testified to by them upon the trial and found by the jury. It seems to us that the facts so shown are not sufficient to call for the granting of a new trial upon the ground of newly discovered evidence. In other words, the alleged newly discovered evidence is almost wholly cumulative touching the extent of respondent's injuries, does not materially aid the defense beyond the showing made in appellant's behalf upon the trial, and would not be likely to change the result. It is worthy of note that manifestly the evidence introduced in respondent's behalf did not tend to show total or permanent disability and the amount of the verdict plainly indicates that the award was not made upon any such theory.

Counsel for appellant call our attention to four decisions of the courts which we think come as near lending support to their contention as any to be found in the books. One of the decisions so relied upon is that of *Wells, Fargo & Co. v. Gunn*, 33 Colo. 217, 79 Pac. 1029. The plaintiff in that case claimed, and the evidence introduced in her behalf tended to show, that her injury consisted of a fracture of the eleventh and twelfth dorsal vertebrae and a contusion of the spinal cord, thereby producing partial paralysis of the entire body; that she was totally disabled; that she might recover her speech but would never be able to walk. The trial resulted in a verdict in her favor of \$5,000. Within thirty-six hours after the case had been submitted to the jury, as was shown by affidavits in support of the defendant's motion for new trial, she was sitting on the side of her bed, was able to pro-

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trude her tongue and talk freely, and her paralysis had disappeared to such an extent that she was able to walk about the room without support of any kind. These facts, discovered almost immediately upon the close of the trial, showed all but conclusively that her injuries were not as claimed upon the trial and as found by the jury. It was there held that the trial court erred in denying a new trial. Manifestly the showing here made is not comparable with that showing.

Another of the decisions relied upon by counsel for appellant is that of *Southard v. Bangor & A. R. Co.*, 112 Me. 227, 91 Atl. 948, L. R. A. 1915B 243. The plaintiff there claimed, and the testimony introduced in his behalf tended to show, that, as the result of his injuries, he was suffering from an incurable disease and that he was physically wrecked. He was awarded by the jury \$8,500. The newly discovered evidence showed acts of the plaintiff very soon following the trial of such a character that he could not have been in the physical condition he claimed he was at the time of the trial. The opinion of the court does not tell us what these acts of the plaintiff were. This decision, so far as can be determined from the facts given therein, seems equally inapplicable here.

Another decision relied upon by counsel for appellant is that of *Colorado Springs & I. R. Co. v. Fogelson*, 42 Colo. 341, 94 Pac. 356. Evidence introduced on behalf of the plaintiff tended to show that the plaintiff was seriously injured, the effects of which would continue indefinitely. He was awarded by the jury \$7,500. Upon the hearing of his motion for new trial, affidavits were produced showing acts and remarks of plaintiff occurring both before and after the trial wholly inconsistent with his being injured as seriously as claimed, such as doing heavy labor at a time when he claimed to be wholly unable to perform such labor. Among other things shown, was that, in a conversation, he was asked why he did not throw away his crutches and go to work, to which he replied, "I could do it all right but it would not look well for me to do so while my case is still in court."

Plainly the decision reversing the trial court and granting appellant a new trial in that case has no controlling force here.

Another decision relied upon by counsel for appellant is that of *Anshutz v. Louisville R. Co.*, 152 Ky. 741, 154 S. W. 13, 45 L. R. A. (N. S.) 87. In that case the plaintiff, a married woman, was injured, which injury and the necessary operation therefor, the evidence tended strongly to show, rendered her barren so she could never thereafter bear children, and that at the time of the trial she was affected with the growth of a tumor in her abdomen, which was also apparently the result of her injury, and would soon necessitate another serious operation. She was awarded by the jury \$7,000. Subsequent to the rendering of this verdict, and within the time defendant could under the laws of Kentucky petition for a new trial, several months after the trial, the plaintiff gave birth to a child, proving conclusively that the supposed tumor was in fact a foetus. This being shown as newly discovered evidence, the defendant was awarded a new trial. It is worthy of note that this decision affirmed the trial court. Plainly this decision could have no controlling force in the disposition of this case.

No decision of any court has come to our notice which has disturbed the denial of a new trial by a trial court upon a showing no stronger than is here made. Our decisions in *State v. Underwood*, 35 Wash. 558, 77 Pac. 863; *Knapp v. Chehalis*, 65 Wash. 350, 118 Pac. 211; and *Hazlett v. Seattle Elec. Co.*, 71 Wash. 377, 128 Pac. 677, lend support to the view that the trial court did not err in refusing to grant a new trial.

We are of the opinion that the judgment should be affirmed. It is so ordered.

MOUNT, MAIN, ELLIS, CHADWICK, FULLERTON, and HOLCOMB, JJ., concur.

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Opinion Per FULLERTON, J.

[No. 13082. Department One. December 5, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v.
CLYDE L. BONHAM, *Appellant*.¹

PHYSICIANS AND SURGEONS—REGULATION—LICENSE TO PRACTICE—STATUTES—CONSTITUTIONALITY. Rem. 1915 Code, § 8392, requiring applicants for licenses to practice medicine and surgery to present a diploma the requirements of which shall have been "in no particular less than those prescribed by the Association of American Medical Colleges for that year," is not unconstitutional as granting legislative functions to such association.

SAME. Such provision could not be objected to by one applying for a license to practice osteopathy, as he was not affected by it, and it will not render the whole act unconstitutional.

SAME—REGULATION—LICENSE TO PRACTICE—METHODS EMPLOYED—OSTEOPATHS—STATUTES. The medical act having made a distinction between the practicing of medicine and osteopathy, confining the practitioners of each to the system they profess to practice; and the practice of osteopathy, at the time of the passage of the act, being confined to treatment without drugs or surgery; one licensed only to practice osteopathy is guilty of a misdemeanor in treating a patient by cutting out the tonsils and administering medicine, to wit, stypticene, under Rem. 1915 Code, §§ 8386-8407, section 8406 making it incumbent upon the holder of a certificate, under penalty of a misdemeanor, to use no deception in the use of titles of his or her mode of treating the sick and to use only such title as he or she holds license to practice.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 2, 1915, upon a trial and conviction of practicing medicine without a license. Affirmed.

Charles H. Müller, for appellant.

Alfred H. Lundin, *W. F. Meier*, and *Joseph A. Barto*, for respondent.

FULLERTON, J.—The defendant, Clyde L. Bonham, was convicted of the crime of practicing medicine and surgery within King county, state of Washington, without a certificate

¹Reported in 161 Pac. 377.

from the board of medical examiners of the state authorizing him so to do, and sentenced to pay a fine of one dollar, together with the cost of the prosecution. From the conviction and sentence, he appeals.

The cause was tried before the lower court upon an agreed statement of facts. The statement shows that the appellant, at the time named in the information, was the holder of a valid, unrevoked certificate issued to him by the board of medical examiners of the state of Washington authorizing him to practice osteopathy in such state, but was not the holder of any of the other forms of certificates the medical board is authorized to issue, and was entitled to practice medicine and surgery in the state of Washington only in such manner as his certificate authorizing him to practice osteopathy entitled him so to do; that, on the day named in the information, one Ray Johnson applied to the appellant to be treated for a diseased condition of the tonsils; that the appellant thereupon undertook his treatment, and in the course thereof administered to him "an anesthetic, to wit, ether, and then and there, removed the tonsils of the said Ray Johnson, by placing a snare around each of said tonsils, and then and there cutting out said tonsils with a knife, . . . and then and there administered to the said Ray Johnson medicine, to wit, styptice, . . .;" that the method employed was the only method for removing the tonsils, and the method used "was the only method in which the said Bonham received instruction" for the removal of diseased tonsils. The stipulation further shows that the appellant matriculated in the Los Angeles College of Osteopathy, of Los Angeles, California, in January, 1906, and graduated therefrom in June, 1908, after having completed the course of study prescribed by such college. It is shown also that the college named was a legally chartered college of osteopathy, requiring actual attendance, and having a course of instruction of more than twenty months.

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The statutes of this state regulating the practice of treating the sick and afflicted (Rem. 1915 Code, §§ 8386-8407) provide for the appointment of a board of medical examiners consisting of nine members, five of whom must be chosen from the regular profession, two from the homeopathic profession, and two from the osteopathic profession. The board is given power to issue certificates to those entitled to practice the healing art, and practicing such art without holding such a certificate is made a misdemeanor. The board has authority to issue three forms of certificates:

“First, a certificate authorizing the holder thereof to practice medicine and surgery; second, a certificate authorizing the holder thereof to practice osteopathy; third, a certificate authorizing the holder thereof to practice any other system or mode of treating the sick or afflicted not referred to in this section.” Rem. 1915 Code, § 8391.

In order to procure a certificate to practice medicine and surgery, applicants must present to the board “a diploma issued by some legally chartered medical school, the requirements of which shall have been at the time of granting such diploma in no particular less than those prescribed by the Association of American Medical Colleges for that year,” together with certain prescribed preliminary and extraneous proofs; such, for example, as that the applicant is of good moral character and that the diploma was not obtained by fraud. To obtain a certificate to practice osteopathy, the applicant is required to present a diploma from “a legally chartered college of osteopathy, having a course of at least twenty months, requiring actual attendance, and after 1909, of three years of nine months each,” together with proofs similar to those of the applicant’s first mentioned. An applicant for a certificate to practice any mode or system of healing the sick or afflicted is required to file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow. In addition to the foregoing requirements, all applicants for cer-

tificates must be personally examined by the board as to their qualifications in the "following fundamental subjects, to wit: anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis and hygiene. Examinations in each subject shall consist of not less than ten questions, none of which shall relate to treatment." Rem. 1915 Code, § 8392.

Under the penalty of a misdemeanor, the act makes it incumbent on holders of certificates to "use no deception in the use of titles of his or her mode of treating the sick, but shall use only such titles as are designated by his or her diploma; or those not having a diploma shall use only such title as he or she holds license to practice." Rem. 1915 Code, § 8406. It is provided, also, that the act shall not be construed so as to discriminate against any particular school of medicine or surgery, or against osteopathy or any system or mode of treating the sick or afflicted, or so as to interfere in any way with the practice of religion, or be held to regulate any kind of treatment by prayer. The statute offers no definition of medicine and surgery, or of osteopathy, or of other modes of treatment mentioned for which certificates to practice may be issued, nor does it undertake to prescribe specifically what mode of treatment the holders of the various certificates may employ in their practice.

The appellant assails the judgment of conviction pronounced against him on two special grounds; first, that the act is unconstitutional; and, second, that his certificate entitles him to employ for the treatment of diseased tonsils the methods employed by him in the treatment of the diseased tonsils of the patient mentioned in the information.

The first objection needs no extended discussion. The question has been twice before this court with reference to this particular act; first, in the case of *State v. Greiner*, 63 Wash. 46, 114 Pac. 897, and later in the case of *State v. Pratt*, 80 Wash. 96, 141 Pac. 318, in each of which the constitutionality of the act was sustained as being within the

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police powers of the state. The appellant's learned counsel, however, suggests a reason for holding the act unconstitutional not suggested in the arguments in the cases cited, and this it may be well to specifically notice. The objection, stated in the language of counsel, is this:

"When the legislature of 1909 incorporated in section 8391 of the act the following language: 'In order to procure a certificate to practice medicine and surgery the applicant for such certificate must file with said board, at least two weeks prior to the regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered medical school, the requirements of which shall have been at the time of granting such diploma in no particular less than those prescribed by the Association of American Colleges for that year,' they granted to the American Medical Association, a nonlegislative body outside of the state, legislative functions, and by so doing aimed to establish a medical hierarchy, which would control the people from birth to death. The bureaucratic rule which it hoped to secure by the passage of that section is un-American in principle and despotic in spirit. It is monopolistic and tyrannical in the most offensive sense of those terms."

But we think it manifest that the clause quoted by counsel cannot bear the construction he places upon it. By this clause, the legislature granted legislative functions to no one. It simply defined the medical schools from which an applicant to practice medicine and surgery in the state must produce a diploma before a certificate authorizing him to do so can be issued to him. The restriction may or may not be a wise one, but this is a question for the legislature and not for the courts. With the courts, the question is one of the power of the legislature to impose the restriction, and we see no reason to question it.

Again, we think the restriction is not one of which the appellant can be heard to complain. He is in no manner affected by it. He applied for and received a certificate to practice osteopathy, and is entitled to practice that profession in the manner and to the extent the certificate permits. It may be

that, should it be held that this particular clause was unconstitutional and that it so far permeated the act as to render it void in its entirety, the appellant would be entitled to an acquittal for the want of a statute on which to base the prosecution. But the statute was enacted in the interest of the public. It was for the protection of the people, and is not to be held unconstitutional as a whole because of the insertion of an unconstitutional restriction unless no other alternative is presented. It is our opinion that we would not be driven to hold the entire act unconstitutional, even though we held the particular restriction invalid; but would be required to hold that the restriction can be rejected and still leave the act enforceable as to its other restrictive and regulative features. Without further pursuing the inquiry, we conclude that the appellant is not entitled to a reversal on the ground of unconstitutionality of the act.

Passing to the second contention, the statute makes it plain, we think, that its framers regarded the practice of medicine and surgery and the practice of osteopathy as separate and distinct methods of treating the sick and afflicted, and intended to confine the practitioners of each to the particular system he professed to practice; in other words, to the system in which he had been educated. It is true, no definition of these terms was offered in the statute, but this would only mean that the terms were used in their general and accepted sense, in the sense in which they were commonly understood at the time of the enactment of the statute. In considering the contention, therefore, we are not particularly concerned with the meaning of the term medicine and surgery, but rather with the meaning of the term osteopathy; the inquiry being, was the method adopted by the appellant in the treatment of the particular patient a recognized method for the treatment of such a disease under the school of treatment known as osteopathy? If it was a recognized treatment according to that school of treatment, the appellant had a

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right to practice it under his certificate from the medical board, if it was not so recognized, he did not.

To determine the meaning of the term osteopathy, resort may be had to the definition and descriptions of it given by the founder of the practice, by those who teach and practice it, and by the lexicographers who define it as a science. The practice was founded by Dr. A. T. Still in about the year 1871. He was a practitioner originally of the so-called old school, and served as a surgeon in the civil war. In the year named, he was practicing his profession at Baldwin, Kansas, when he announced to his patients that he had evolved a system of drugless healing, and that he had done with drugs forever. Shortly afterwards, he removed to Kirksville, Missouri, where he practiced his new system until 1890, when he founded a school for the instruction of others. This school was subsequently chartered by the state of Missouri under the name of the American School of Osteopathy, and was the first school organized to teach the particular form of treatment. Dr. Still described his system in the following language:

“Osteopathy deals with the body as an intricate machine, which, if kept in proper adjustment, nourished and cared for, will run smoothly into a ripe and useful old age. As long as the human machine is in order, like the locomotive or any other mechanical contrivance, it will perform the functions for which it was intended. When every part of the machine is adjusted and in perfect harmony, health will hold dominion over the human organism by laws as natural and immutable as the law of gravitation. Every living organism has within it the power to manufacture and prepare all chemicals, materials and forces needed to build and repair itself, together with all the machinery and apparatus required to do this work in the most perfect manner, producing the only substance that can be utilized in the economy of the individual. No material other than food and water taken in satisfaction of the demands of appetite (not perverted taste) can be introduced from the outside without detriment.”

In the catalogue of the Los Angeles College of Osteopathy, the college from which the appellant is a graduate, osteopathy is defined in the following language:

"Osteopathy is a system of rational therapeutics which (1) recognizes that resistance, relief and recovery are functions inherent in the organization of living bodies and that a deviation from the state of health implies either the absence of some of the natural influences, agencies or conditions that maintain these functions, or derangement in their structural or organic basis, and (2) treats disease by employing as remedies (a) the natural causes of normal function, and (b) manipulation to restore normal anatomical relations."

In the catalogue of the College of Osteopathic Physicians and Surgeons of Los Angeles, California, which was formed by the amalgamation of the Los Angeles College of Osteopathy and the Pacific College of Osteopathy, the term is defined as follows:

"Osteopathy is founded on the eternal truth that each individual lives by means of his own bodily activities and will continue to live in a state of health just so long as his body is able to adapt itself to the external influence surrounding it. When adaptation fails and disease arises the osteopathic physician appeals to no charms; does not try to drive demons out with nostrums; knows too much about physiology to administer a cause of more disease in the form of a poison; takes out none of the pieces of which the human body—the most wonderful of all machines—is composed; nor is he so devoid of human sympathy and common sense that he can say to himself 'The suffering of others is imaginary.' Instead of these uninstructed ways of interpreting disease, the osteopathic physician views the problem as a natural event arising under the operation of natural law and susceptible of scientific analysis and solution. He knows that the human body is a protoplasmic machine, a chemical machine and an anatomical machine. He knows that the body as a whole must be kept in protoplasmic equilibrium, chemical equilibrium, and anatomical equilibrium. He further knows that the unceasing normal flow of nervous energy is necessary for the maintenance of protoplasmic harmony, and the unceasing, uninterrupted flow of blood is necessary for the main-

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tenance of chemical harmony and union throughout the body. He knows that, given a body in equilibrium, anatomically, protoplasmically and chemically, the only things needed by it are food, water, air and exercise. Therefore, when confronted with a diseased body, the osteopathic physician proceeds, first, to correct all anatomical derangements, so that nervous energy and blood may flow without hindrance between each part of the body and every other part. This restores to the body its capacity to take advantage of the beneficial and to resist the injurious in its medium. He then surrounds it with the external agencies necessary to normal life, and the result is health."

Webster's New International Dictionary defines the term in this language:

"A system of treatment based on the theory that diseases are chiefly due to deranged mechanism of the bones, nerves, blood vessels, and other tissues, and can be remedied by manipulations of these parts."

In Funk & Wagnalls New Standard Dictionary of the English Language, the word is defined as follows:

"A system of treating diseases without drugs, propounded by Dr. A. T. Still in 1874. It is based on the belief that disease is caused by some part of the human mechanism being out of proper adjustment, as in the case of a misplaced bone, cartilage or ligament, adhesions or contractions of muscle, etc., resulting in unnatural pressure on or obstruction to nerves, blood, or lymph. Osteopathy, through the agency or use of the bones (especially the long ones which are employed as levers), seeks to adjust correctly the misplaced parts by manipulation."

In the Century Dictionary and Cyclopedia, under the word osteopathy, it is said:

"A theory of disease and a method of cure, advocated by Dr. A. T. Still, resting on the supposition that most diseases are traceable to deformation of some part of the skeleton (often due to accident) which by mechanical pressure on the adjacent nerves and vessels interferes with their action and the circulation of the blood. As a remedy a form of manipulation is used."

The case of *Bragg v. State*, 134 Ala. 165, 32 South. 767, 58 L. R. A. 925, while not in point perhaps on the main question here involved, is interesting because containing the view of a graduate of the parent school as to the teachings generally of the schools of osteopathy. He was prosecuted for practicing medicine without first having obtained a certificate of qualification from one of the authorized boards of medical examiners of the state. The case was heard upon an agreed statement of facts, which contained the following recitals:

"The method of treatment by the practitioners of osteopathy is a system of manipulation of the limbs and body of the patient with the hands, by kneading, rubbing or pressing upon the parts of the body. In the treatment, no drug, medicine or other substance is administered or applied, either internally or externally; nor is the knife used or any form of surgery resorted to in the treatment. The practitioner himself performs the manipulations. The teaching and theory of those skilled in osteopathy are, that it is a system of treatment of disease by adjustment of all the parts of the body mechanically. It is taught that any minute or gross derangement of bony parts; contracting and hardening of muscles or other tissues; or other mechanical derangements of the anatomical parts of the body which must be in perfect order mechanically, in order that it may perform its function aright, nerve centers, arteries, veins and lymphatics, which must function properly in order that health may be maintained. It is taught that such interferences lend to congestion, obstructed circulation of blood and lymph, irritation of nerves and abnormal state of nerve centers; that the result is disease which can be cured only by righting what is mechanically wrong. . . . The essential things taught in the schools of osteopathy are anatomy, physiology, hygiene, histology, pathology and the treatment of diseases by manipulation. The repudiation of drugs and medicine in the treatment of diseases is a basic principle of osteopathy and a knowledge of drugs or medicines, their administration for the cure of diseases, the writing and giving of prescriptions, are not essential to the graduation of, and the issuance of diplomas to, students of osteopathy."

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When tested by the foregoing definitions, it is manifest that the practice of osteopathy, as it was originally understood and as it was understood at the time of the enactment of our medical act, did not sanction the internal administration of medicines or the surgical use of the knife as a means for curing diseases. As founded, its principal tenet was the abandonment of these means of cure. A perusal of the successive catalogues of its schools will show that their teachings are gradually being expanded, and that the more modern of them now teach in some degree much that is taught in the older schools of medicine. The parent school has been more marked in this respect than perhaps any of them. It now teaches that in "childbirth lacerations," in "certain types of congenital deformities, certain kinds of tumors, etc., surgery must step in," and that surgery must be resorted to for the removal of tissues so badly diseased or degenerated that regeneration is impossible by the process of adjustment. But this advance is modern. It was not in vogue even so late as 1909, the time of the enactment of our medical act. Moreover, it is not yet taught in the school of which the appellant is a graduate. The quotation we have made from the catalogue of the College of Osteopathic Physicians and Surgeons, of Los Angeles, California, is taken from the issue of 1914-1915. It will be observed from its perusal that this particular school still regards the internal administration of drugs as the administration of poison, and the surgical resort to the knife as unnecessary; at least, we take this to be the meaning of the assertions that the osteopathic physician "knows too much about physiology to administer a cause of more disease in the form of a poison," and "takes out none of the pieces of which the human body—that most wonderful of all machines—is composed." But if all of the osteopathic colleges were now teaching the administration of medicines and the resort to surgery by the knife as a means of curing diseases, it would not aid the appellant. His right is to practice osteopathy as that practice was understood at the time the

medical act was adopted, and this we conclude did not sanction the practice resorted to by him in the treatment of the patient mentioned in the information.

The appellant cites cases from this court and cases from the courts of many other of the states holding that the practice of osteopathy is the practice of medicine and surgery within the meaning of the medical acts prohibiting the practice of medicine and surgery without a certificate or license so to do from the proper state authorities. But the principle of these cases we cannot think has any bearing on the question here involved. The purpose of osteopathy is to heal the sick, and it is not denied that the treatment it affords, even in its most restricted use, falls within the generic meaning of the terms "medicine and surgery." But the question here is not this. It is much more narrow. It is, rather, did the appellant's certificate of practice authorize him to resort to the form of treatment he resorted to in the particular instance. It is our conclusion that it did not.

The judgment is affirmed.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

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Statement of Case.

[No. 13102. *En Banc*. December 5, 1916.]

HENRY BRICE, *Respondent*, v. S. H. STARR *et al.*,
Appellants.¹

ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING. A subsequent suit cannot be pleaded in abatement of a prior action for the same cause.

ACTIONS—JOINDER—SPLITTING CAUSES OF ACTION—WAIVER OF OBJECTION—EFFECT—JUDGMENT—BAR. Where defendants submitted to the trial of a second action before trial of a prior action growing out of the same transaction, without moving for a consolidation and without raising any objection to the splitting of causes of action by the two suits, they waived the right to object and cannot plead the judgment in the second action as a bar to judgment in the first action, as to matters not actually tried and decided in the second action (overruling, on rehearing, *Id.*, 90 Wash. 369).

JUDGMENT—BAR—RES JUDICATA—MATTERS CONCLUDED. Where plaintiff, defrauded by defendants in a deal for lands, began two actions, the first to recover damages for the fraud, and the second asking cancellation of their deed for the same fraud without asking any money judgment, judgment in the second action, which was first tried, granting cancellation, is *res judicata* only of the matters actually tried and decided, and cannot be pleaded in bar of a money judgment in the first action, the defendants having failed to move for a consolidation of the actions or to object to the splitting of plaintiff's cause of action (overruling, on rehearing, *Id.*, 90 Wash. 369).

SAME. In the subsequent trial of the first action, it was not error to refuse the defendants the right to relitigate the issue of fraud, which was the only issue decided by the prior judgment in the second suit.

Appeal from a judgment of the superior court for King county, Ronald, J., entered July 17, 1915, upon findings in favor of the plaintiff, in an action for fraud, tried to the court. Affirmed.

Bryan & Colvin, for appellants.

John W. Whitham, for respondent.

¹Reported in 161 Pac. 347.

ON REHEARING.

ELLIS, J.—This case is before us on a rehearing *En Banc*. The facts are sufficiently presented in the opinion of Department Two rendered on the former hearing. *Brice v. Starr*, 90 Wash. 369, 156 Pac. 12. The sole question is this, Was the pendency of the action to cancel the deed a bar to the prosecution of the action to recover the amount of the mortgage wrongfully placed upon the land by appellants? This action was the first instituted. It grew out of the same transaction set up in the second action to cancel the deed for fraud. Had appellants deemed themselves aggrieved by the prosecution of two actions, their proper course was to demur to the complaint in the second action; or, if the complaint did not show on its face the fact of the pendency of the first action, to plead the pendency of the first as a bar to the second. The first action might have been invoked as a bar to the second; the second could not be invoked as a bar to the first. As said by Brewer, J., in *Rixer v. Gillpatrick*, 16 Kan. 564, 567:

“The pendency of an action will make a second action, for the same cause, and in which the same judgment can be rendered, abatable; but not *vice versa*.’ *Buffin v. Tilton*, 17 Pick. 510; *Webster v. Randall*, 19 Pick. 13. A subsequent suit may be abated by an allegation of the pendency of a prior suit, but the converse of the proposition is, in personal actions, never true.”

And again, as said by Campbell, J., in *Callanan v. Port Huron & Northwestern R. Co.*, 61 Mich. 15, 27 N. W. 718:

“There is no case that we know of sustaining any such doctrine as will give a subsequent suit the effect of abating a prior one.”

See our own decisions, *Westmoreland Co. v. Howell*, 62 Wash. 146, 113 Pac. 281; *Olson v. Seldovia Salmon Co.*, 89 Wash. 547, 154 Pac. 1107. See, also, *Webster v. Randall*, 19 Pick. 13, 20; *Humphries v. Dawson*, 38 Ala. 199; *Morton*

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v. Webb, 7 Vt. 123; *Welch v. Sage*, 47 N. Y. 148, 7 Am. Rep. 423; *Blumenthal v. Taylor*, 44 Ill. App. 139.

We are not advised whether appellants did interpose in any way in the second action the objection that another action was pending which they now urge in this, the first action. Certain it is, however, that they did not appeal from the decision in that action, and hence they are now precluded from raising the question, since they did not raise it in the only action in which it properly could be raised, namely, in the action last instituted; or, if they raised it, acquiesced in an adverse decision on that point, as well as on all others there decided, by their failure to appeal. It follows that, having submitted to a trial of the second action without moving therein for a consolidation with the first and without raising the objection that by it respondent was splitting his cause of action, appellants waived the right to raise that objection here. On the first hearing, sufficient importance was not attached to the admitted fact that the action now before us was the action first instituted, and that the objection now urged could have been properly urged only in the other action. Counsel on both sides seem to have lost sight of this fact and of its significance. Nor can the appellants be permitted to invoke the decree in the second action as *res judicata* of the issue here. It can only be invoked as *res judicata* of the issue there actually tried and decided. This is demonstrable. The only wrong done to appellants by prosecuting two actions founded on the same fraud for separate branches of the relief to which respondent was entitled, is the wrong of being vexed by two actions—the wrong of splitting the relief. *Buffum v. Tilton*, 17 Pick. 510. They could have avoided this by pleading the first action in abatement of the second. Not having done so, they have waived the right now to object to the two suits. They must submit to the recovery in the first suit of all relief which was not actually obtained in the second suit. In such a case, it is the judgment as entered, not the judgment which might have been entered,

which is *res judicata*. It is true that usually a judgment is *res judicata* not only of what was decided but of what might have been decided therein, but this is only because a party is presumed to intend to secure all the relief possible in a single action. But where, at the very time of the bringing of the second action, a prior action was pending for a part of the relief which, though it might have been recovered in the second action, *was not recovered* therein, the presumption that he abandoned or waived that part of his relief cannot obtain. The very pendency of the other action negatives the presumption. In such a case, we are clear that the judgment in the second suit ought to be held *res judicata* only of what it actually adjudged, not of what it might have adjudged had all the relief possible been sought in a single action. Matters expressly omitted in one suit are not *res judicata* in another. 1 Van Fleet's, Former Adjudication, p. 183, § 53.

A defendant is advised the moment a second action is commenced that he will have to respond to two actions unless he plead the first in abatement of the second, or demur in the second on the ground of pendency of the first. When he fails to do either, he invites the very error of which appellants now seek to avail themselves by a plea of *res judicata* when the first action came to trial.

In the case here presented, by submitting to a judgment in the second action without pleading the first action in abatement and without appeal, knowing all the time that another action was pending for other relief growing out of the same fraud, appellants invited the error of the trial court in permitting the maintenance of the two actions. Appellants should not now be permitted to invoke that error as ground for *res judicata*. They cannot take advantage of an error which they themselves invited. A lawsuit is not a mere game in which the prize must always go to the more adroit and skillful. It is a means to an end, and that end is, or should be, justice. Substantial justice is and always will be possible of attainment by the rule above announced. It would

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often be made impossible of attainment by the rule laid down in the departmental opinion. No better illustration of this can be found than the case before us. In the suit to cancel the deed, the findings declared:

"That the court finds to be true as alleged in paragraph III of plaintiff's complaint that while plaintiffs were so the absolute owners of said premises the said defendant, S. H. Starr, falsely and fraudulently pretended and represented to plaintiffs that he desired to and would purchase said property at the agreed price of \$3,200; that he had arranged to borrow two thousand dollars from a friend who would not charge him any commission in case plaintiffs would convey title to said defendant so that he could mortgage said premises; that in that event he would pay said sum of \$2,000 over to plaintiffs to be applied on the purchase price; . . ."

And again:

"That instead of borrowing said sum of \$2,000, without having to pay a commission, and applying the same on the purchase price, defendants did on June 2, 1914, mortgage said premises to the Seattle Trust Company in the sum of \$1,400 and left the state of Washington, appropriating the said sum to their own use. . . ."

If these findings are true—and we must so assume since no appeal was taken from the decree founded thereon—then appellants, by their plea of *res judicata*, are now seeking to retain the fruits of that fraud by pleading it as an adjudicated fact. If the fetters of precedent were so powerful as to force a result so monstrous, it would be high time that we break them. But in every case cited in the former opinion the plea in bar was interposed in the second action, not in the first; and the judgment invoked as *res judicata* was the judgment in the first action, not in the second. There are decisions which hold that the right to plead the judgment in a second action as a bar to a recovery in the first is not waived by the failure to plead the pendency of the first action as a bar to the prosecution of the second; but that rule should only apply where the demands in the two actions are in their

very nature single and entire. Here, however, the demands, though arising out of the same transaction, hence such as might have been tried in the same suit, are in their nature distinct and separable. The one was to cancel the deed, the other to recover for the wrongful mortgaging. In such a case, it seems only consonant with reason that the failure to plead the first action as a bar to the second, or to demand consolidation, ought to estop a defendant from claiming that the judgment in the second action is *res judicata* of anything except what it actually determined. See, *Fox v. Althorp*, 40 Ohio St. 322.

The general observations found in 1 Herman, Estoppel and Res Judicata, § 270, seem peculiarly pertinent here.

"There are many reasons why the plea of *res judicata* should be more cautiously received under the Code system of pleadings, than is or was necessary under the common law system of pleading. The want of certainty in the system of pleading under the Code renders it not unfrequently difficult, if not impossible, to determine what issues have been joined, and the precise rights which have been adjudicated. The united law and equity jurisdiction enables parties litigant to embrace in the same suit more than one cause of action or defense, which would be incongruous and inadmissible under a different system, and perhaps the widest range known to any system tolerated in the form and scope of code pleadings. Parties who have several causes or rights of action against the same party, of different and distinct character, are not compelled to unite them in the same suit, on penalty of being barred as to those not included; nor, is this the meaning of that well-settled principle, that a judgment or decree of a court of competent jurisdiction is final and conclusive, not only as to every matter determined, but also as to every other matter which the parties might litigate in the cause, and which they might have had decided; . . . The Code system of pleading does not by any means favor a multiplicity of suits, and when the proper parties are brought before them, the courts will hear and finally determine all the rights of the parties touching the subject-matter, if properly presented, whether such was the original intention of the parties or not; but, if neither party demands a judgment upon the

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merits of the respective rights claimed, and the judgment of the court appears to have been rendered upon the merits of a mere preliminary question, it would be rendering harsh injustice, and make justice and equity a species of tyranny utterly antagonistic to the signification of those terms."

Here neither party demanded that the whole matter be determined in the second action, which was the first brought to trial, nor was the whole matter there determined. Neither party asked for a consolidation. Appellants were not deceived as to respondent's intention to pursue both actions to judgment, yet they did not move to abate the one which might have been abated. Whatever the general rule, no court ought to permit the equitable doctrine of *res judicata* so to operate as to defeat a recovery to which the findings and decree in the second suit clearly show respondent entitled. The judgment in the second action here involved certainly is *res judicata*, but it must have the opposite effect from that contended for by appellants. It is only *res judicata* of the things actually decided. It proves that the deed was fraudulently obtained, and hence that the mortgage was fraudulently given and the proceeds wrongfully appropriated, and conclusively establishes respondent's right to recover a money judgment in the amount of the mortgage and interest, but it does not preclude that recovery in another suit which was the first instituted.

We find no error in the refusal of the court to permit appellants to relitigate the issue of fraud by offering proof of the matters set up in their answer. The issue of fraud was the only issue in the second suit and was decided therein adversely to appellants.

The judgment of the trial court is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, FULLERTON, MOUNT, PARKER, and CHADWICK, JJ., concur.

[No. 13125. Department Two. December 5, 1916.]

THE CITY OF OLYMPIA, *Plaintiff*, v. MILLARD LEMON *et al.*,
Appellants, M. E. REED *et al.*, *Interveners and*
Respondents.¹

TRIAL — FINDINGS OF FACT — NECESSITY — EQUITABLE ACTIONS. Where, in eminent domain proceedings to acquire property for a street, on objections to the assessment roll raising the issue that the property already belonged to the city, it was stipulated that the court should determine that question, the action became in effect an equitable action to quiet title in the city; and therefore findings of fact were not essential to sustain a judgment in favor of the city.

MUNICIPAL CORPORATIONS—STREETS — ESTABLISHMENT — PRESCRIPTION — ADVERSE USE — EXTENT — WIDTH OF STREETS. Where, for a period of thirty-four years, there had been a well-defined road of from eight to fourteen feet in width in a city, used by the public "for miscellaneous purposes," the public is not limited to such width as was actually used, but is entitled to such as is reasonably necessary for the easement of travel; hence an adjoining owner who recognized the public right to the extent of dedicating a fifteen-foot right of way, cannot thereby confine the public to that width, or claim damages for the appropriation of a strip thirty feet in width, where the same appears reasonably necessary, in view of the statute making county roads from 60 to 30 feet in width, and in view of a sixty-foot width for adjacent streets and the northern portion of the street in question.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered June 22, 1914, upon findings in favor of the interveners, dismissing proceedings to condemn property for street purposes, after a trial and hearing on objections to the assessment roll. Affirmed.

Troy & Sturdevant, for appellants.

Frank C. Owings, for respondents.

MAIN, J.—The purpose of this action, as originally instituted, was to condemn for street purposes two certain strips of land, each thirty feet wide. The city of Olympia, desiring

¹Reported in 161 Pac. 363.

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to extend Jefferson street south from Broadway to 18th street, a distance of two blocks, brought the action against the parties who claimed to own the strips of land mentioned. After the condemnation proceedings had been instituted, the Casco Company, a corporation which claimed title to the property by conveyance from the previous owners, consented to a decree of necessity, and agreed to submit the issue as to the value of the land taken, and the damages to the land not taken, to what is referred to as a board of appraisers. As a result of this agreement, the appraisers made an award in favor of the Casco Company in the sum of \$900. Subsequently a judgment was entered for this amount. After the judgment was entered, an assessment roll was prepared, which assessed the amount of the condemnation judgment against the adjacent property. Certain persons whose property was covered by the assessment roll filed objections thereto, and asserted that the land described in the condemnation judgment as belonging to the Casco Company was not in fact the private property of that company, but was public property, owned by the city for street purposes. When this issue was presented, it was stipulated by the parties that the court in this action should determine the question raised by the objections to the assessment roll. This was done, with the result that a judgment was entered which dismissed the action and decreed that the title to the property sought to be condemned was vested in the city for street purposes. From this judgment the appeal is prosecuted.

The first claim of error is the refusal of the trial court to make and enter findings of fact and conclusions of law. The appellants contend that an action in condemnation is a law action, and therefore the failure to make findings and conclusions is fatal to the judgment. Whether a condemnation proceeding is legal or equitable in its nature need not here be determined. By the stipulation referred to, the parties agreed to submit to the court the question whether the city had acquired title by prescription to the property sought to

be condemned. By the stipulation, the action, in effect, became one on the part of the city to quiet title to the two strips of land covered in the condemnation action as originally instituted. If the action became one to quiet title, it will hardly be contended that it was not an equitable action. The action, having become by virtue of the stipulation one in equity, no findings of fact or conclusions of law were necessary.

On the merits of the case, after an attentive consideration of the entire record, we are satisfied that the city, by prescription, has acquired title to the land in controversy for street purposes. The evidence shows, without contradiction, that, for a period of at least thirty-four years prior to the institution of this action, there was a well-defined road of from eight to fourteen feet in width, either over the land involved, or over the fifteen feet immediately adjacent thereto. This road was used generally by the public, and, as stated by one of the Casco Company's grantors, "for miscellaneous purposes." The evidence clearly establishes an actual general public use, which was uninterrupted and continuous, under claim of right, for a greater number of years than was necessary to acquire title by prescription. This right on the part of the public seems to have been recognized by the Casco Company's grantors, for while title remained in them, they filed a plat in which they dedicated a fifteen-foot strip for street purposes, adjacent to the thirty-foot strips here in controversy. The question then arises as to the width of the strip of land acquired by user. In other words, did the user give to the public the right to only that portion actually used in travel, or did it give the right to a sufficient width for street purposes. In *Yakima County v. Conrad*, 26 Wash. 155, 66 Pac. 411, it was held that after the right to a highway has been acquired by usage, the public are not limited to such width as has actually been used, but have a right to a highway of such width as is reasonably necessary for the easement of travel. It was there said:

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"Under the general laws of this state, at the time the rights of the public became fixed in this road the maximum width of county roads was sixty feet, and the minimum width thirty feet. This is a circumstance that the court could take into consideration in fixing the width of the road. After the right to a highway has been acquired by usage, the public are not limited to such width as has actually been used. The right acquired by prescription and use carries with it such width as is reasonably necessary for the public easement of travel, and the width must be determined from a consideration of the facts and circumstances peculiar to the case. Whatever may be the width in any particular case, the easement, when acquired by user, cannot be limited to the actual beaten path. . . . It is generally a question of fact to be determined under the circumstances of each particular case, and the easement may be as broad as the public require for passing as well as traveling in one direction."

See, also, *Whitesides v. Green*, 13 Utah 341, 44 Pac. 1032, 57 Am. St. 740; Elliott, *Roads & Streets* (2d ed.), § 174, and cases cited.

In view of this rule, and taking into consideration the width of the northern portion of Jefferson street, as well as the width of the adjacent streets, we conclude that the thirty feet involved in this action was acquired by usage for the exigencies of public travel.

The judgment is affirmed.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 13211. Department One. December 5, 1916.]

MARGARET WATSON, *Appellant*, v. BENJAMIN F. WATSON
et al., *Respondents*.¹

JURY—RIGHT TO JURY TRIAL—EQUITABLE ACTIONS. An action to recover an interest in an estate as the widow of the deceased, in which the chief question at issue is that of marriage, is of equitable cognizance, within Rem. 1915 Code, § 315, in which there is no right to trial by jury, especially where one party demands an accounting and an injunction and the other a decree quieting title.

MARRIAGE—FINDINGS—REVIEW — CONCLUSIONS OF LAW. Findings to the effect that a white man lived and cohabited with an Indian woman for years, without there having been any ceremonial marriage between them, that he was known as a "squaw man," that they kept their property and its increase separate, supports the conclusions of law that they were not married and that the woman had no community interest in the man's property.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered August 16, 1915, upon findings in favor of defendants, in an action for equitable relief, tried to the court. Affirmed.

E. K. Brown and Martin & Jesseph, for appellant.

Hovey & Hale, for respondents.

FULLERTON, J.—James Watson died on October 16, 1913, leaving an estate consisting of real and personal property of the estimated value of some \$50,000. By a nonintervention will, he divided his estate among certain relatives, bequeathing also to an Indian woman, known as Margaret Watson, with whom he had lived for about thirty-three years, \$1,000 in cash and a yearly allowance of \$250 during her life. After the expiration of the period for filing claims, and when the estate was ready for distribution, the Indian woman, claiming as the widow of Watson, began an action seeking to have set aside to her, as the wife of the decedent, one-half

¹Reported in 161 Pac. 375.

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of all the real estate and personal property above referred to. She also asked that certain other property be assigned to her in her separate right, that the executors named in the non-intervention will be restrained from further proceeding with the control and management of such property, and that her title thereto be quieted. The defendants, by their answer, in addition to denials and an affirmative defense, set up a cross-complaint to the effect that the plaintiff's claim constituted a cloud on their title, and prayed that their title be quieted. The action was tried to the court sitting without a jury, and resulted in a judgment against the plaintiff, in which the title to the property of the estate was quieted in the executors. The plaintiff appeals.

The first error assigned is the refusal of the court to grant the demand made for a jury trial. The appellant contends that the action is one at law, that it presents an issue of fact for the recovery of money and specific real and personal property, which, under Rem. 1915 Code, § 814, is required to be tried by jury, unless a jury be waived. But plaintiff's right to the real and personal property in dispute is altogether dependent upon the primary issue as to whether or not she was the legal wife of the decedent. That relationship is alleged and denied, and is the very foundation of the action. The chief question being that of marriage, it was one properly for the court to determine. But more than this, the action is one of equitable cognizance as disclosed by the pleadings. Both appellant and respondents demand relief that can only be awarded in an action of equitable cognizance. A part of appellant's relief demanded involved an accounting as to the proceeds and increase of her property, covering a period of more than thirty years' time, and the plaintiff also sets up that the accumulation of property claimed by the executors was partly due to her personal efforts as well as to her advancement of funds, and that the executors are dissipating the property of the estate and will continue such

acts unless restrained. This clearly presents an action of equitable cognizance.

We think the principal question involved is the same as that presented in *Enos v. Hamblen*, 79 Wash. 588, 140 Pac. 675, where we held that an action seeking to establish plaintiff's right as widow of a decedent was an equitable one. We there said:

"The estate in this case is in the possession of the executor. The property in his possession is a trust fund, first, for the payment of the costs and expenses of administration, and second, to be distributed to the persons lawfully entitled thereto. A person claiming to be an heir or a community owner of the estate must establish his claim at some place in the proceedings, and when established, they are entitled to the distribution which the law authorizes. In order to establish a right to the estate as distributee, the proceeding must necessarily, we think, be an equitable one and falls within the provisions of Rem. & Bal. Code, § 815 (P. C. 81 § 207), above quoted."

The appellant seeks to distinguish the case cited from this one, on the ground that the former was an application in the probate proceedings to establish claimant's status as wife of decedent in order to fix her right to distribution, while the present case is an independent action to determine appellant's rights in a decedent's estate which, by reason of the nonintervention will, has never been in the custody of the court. But the object in both actions, the *Enos* case and this one, was to fix plaintiff's status as the wife of decedent as the basis of any claim of right to share in the estate, and this we hold is an action of equitable cognizance.

From the evidence deduced at the trial, the court made findings of fact to the effect that the decedent, James Watson, came to the Territory of Washington about the year 1876, and took up his residence in what is now the county of Kittitas; that he resided within a few miles of what is now the city of Ellensburg, from the summer of 1877 until about the year 1909, when he went to Okanogan county, where he lived most of the time until his death on October 16, 1918; that decedent

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left a will in which appellant was granted a legacy of one thousand dollars and an annuity of two hundred and fifty dollars, and further legacies to the other respondents in this action other than the defendant James Ramsay, one of the executors; that the will was admitted to probate in Kittitas county, Washington, on the 11th day of November, 1913, and the year's notice to creditors given, the time for presenting claims expiring about November 13, 1914; that the inheritance tax was paid to the state and that the executors are now handling the property of the estate, the will being what is known as a nonintervention will under the laws of this state.

It further found that, at the time of Watson's death, all his property was situate in Kittitas county, except some horses and cattle of the value of about six hundred dollars, which he had with him in Okanogan county; that his property, in addition to the horses and cattle, consisted of \$6,000 deposited in a bank, one hundred and sixty acres of land acquired by him by purchase in the year 1877, one hundred and sixty acres which he acquired under the homestead laws of the United States, a forty-acre tract which he purchased in 1900, one hundred fifty-nine shares of stock in the Ellensburg Water Company, and five shares in the Bull Ditch Company, all of which is needed to procure water for the irrigation of the land. The court also found that, in about the year 1885, the decedent commenced living with the appellant, and from that time on kept her at his house, where she performed the ordinary duties of a housekeeper; that there never was any ceremonial marriage between decedent and appellant; that they were never married, but that decedent was what was known as a squaw man, and was so reputed in the community where he and appellant resided; that decedent, at the time appellant took up residence with him, was possessed of a considerable quantity of horses, a portion of which was afterwards traded for cattle; that all of the property at present belonging to decedent's estate consists of property which the decedent owned prior to beginning cohabitation with appellant, or is

the proceeds or natural enhancement in value of such property, save a bequest of \$2,000 which decedent received from the estate of a deceased brother; that, at the time appellant went to live with decedent, she was the owner of about thirty Indian ponies and some twenty head of cattle, which she always kept separate from the property of decedent, each of them employing separate brands for their own live stock; that there is no satisfactory proof that decedent ever received any portion of the proceeds of the sale of any property belonging to appellant; that the executors of decedent's estate have paid appellant the sum of \$325 on account of sums due her under the will, and have at all times been ready and willing to pay over the sums provided for appellant under the will.

As conclusions of law, the court found that appellant was not the wife of decedent, James Watson, and that, even if there had been a marriage between them, all of the property now comprised in the decedent's estate is the separate property of such decedent, and its disposition governed by his will; that appellant is not entitled to recover; that respondents are entitled to a decree quieting title to all the property belonging to the estate of James Watson, deceased, and that appellant has no interest therein.

The appellant excepts to the foregoing findings of fact as being contrary to the evidence introduced, and to the conclusions of law as not supported by the evidence, the findings in the case, nor the law applicable thereto. It would subserve no useful purpose to review the evidence. We have carefully examined it and are satisfied that it supports the findings by a strong preponderance. It seems, also, too clear to require argument that the findings support the conclusions of law and the decree founded thereon.

The judgment should be affirmed, and it is so ordered.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

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[No. 13161. Department One. December 5, 1916.]

R. H. MARTIN, *Appellant*, v. JOHN G. CUNNINGHAM,
Respondent.¹

RELEASE AND DISCHARGE—DAMAGES INCLUDED—INJURIES TO SERVANT—MALPRACTICE OF PHYSICIAN. Malpractice by an attending physician, in a case in which the master was liable for the original injury, being one of the probable consequences of the injury for which the master is liable whether furnishing the physician or not, a release of all damages, given to the master in full settlement of any and all claims of every kind, operates to discharge a physician furnished by the master, and precludes an action against the physician for malpractice in treating the injury and carelessly aggravating the damages (ELLIS, J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Clifford, J., entered March 19, 1915, upon granting a nonsuit, dismissing an action for malpractice, tried to the court and a jury. Affirmed.

F. A. McMaster, for appellant.

Harry L. Cohn and *Cannon & Ferris*, for respondent.

FULLETON, J.—On November 7, 1913, R. H. Martin, a fireman in the employ of the Great Northern Railway Company, fractured the tibia of his left leg in jumping from an engine to avoid a head-on collision. He was taken to a hospital in Spokane and placed in charge of the company's local surgeon, John G. Cunningham, who treated him from that date until about March 10, 1914. Satisfactory results not having been effected under the treatment accorded by the surgeon, another surgeon was called in by Martin, who operated on him and produced better results, but did not obtain a perfect cure of the injured leg.

On June 13, 1914, Martin filed a complaint for personal injuries against the railway company. On July 6, 1914, the action was compromised for \$8,000, and a judgment of dis-

¹Reported in 161 Pac. 355.

missal entered on the stipulation of the parties. On the same day, Martin and wife executed a release to the Great Northern Railway Company, which recited that it was in consideration of the payment of \$8,000 for the above mentioned injury received on November 7, 1913, "including all claims for loss of time and loss of services, support and society, and all claims for medical, surgical, nursing, hospital and other expenses, arising, or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said railway company prior to the date of these presents." The release further recited, under an addendum, that the \$8,000 was "in full settlement of any and all claims of every kind."

After Martin had settled with the railway company and released it from all claims growing out of the injury, he began an action against Dr. Cunningham to recover damages for malpractice in the treatment of his injured leg. The defendant set up several affirmative defenses, the only one necessary to be considered here being the release before mentioned. On this release appearing in the evidence, and on it further appearing that both the plaintiff and defendant were employees of the company, the court entertained a challenge to the sufficiency of the evidence, and entered a judgment dismissing the action. From this judgment, the plaintiff appeals.

The trial court held that the release operated to discharge the respondent as well as the railway company, since the negligent treatment of the injury was necessarily a part of the original injury. We think this holding is in accord with the weight of judicial authority. The prevailing rule is that one who has been injured through the negligence of his employer can recover all damages proximately traceable to the primary negligence. This right of recovery extends even to subsequent aggravations whose probability the law regards as a sequence and natural result likely to flow from the original injury. *Smith v. Northern Pac. R. Co.*, 79 Wash. 448, 140 Pac. 685; *Hoseth v. Preston Mill Co.*, 49 Wash. 682, 96 Pac. 423. Mal-

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practice of an attending physician, in a case where the master was liable for the original injury, has always been regarded by the law as one of the probable consequences of the injury, whether the surgeon be furnished by the master or employed with due care by the servant. This principle is well stated in *City of Dallas v. Meyers* (Tex. Civ. App.), 55 S. W. 742, as follows:

"If the injured party, in good faith, and in the exercise of ordinary care, employs a physician to treat his injuries, and his injuries are aggravated through the mistake or negligence of his physician in his treatment, the negligent or mistaken treatment of the physician does not become an intervening cause, breaking the causal connection between the negligence producing the original injury and the ultimate effects of such injury. In such case the injured party may recover damages for the injury he has sustained, including the aggravation resulting from the negligence of his doctor."

See, also, *Baldwin v. Lincoln County*, 29 Wash. 509, 69 Pac. 1081; *Gray v. Boston Elevated R. Co.*, 215 Mass. 143, 102 N. E. 71; *Reed v. Detroit*, 108 Mich. 224, 65 N. W. 967; *Lyons v. Erie R. Co.*, 57 N. Y. 489; *Chicago City R. Co. v. Saxby*, 213 Ill. 274, 72 N. E. 755, 104 Am. St. 218, 68 L. R. A. 164; *Fields v. Mankato Electric Traction Co.*, 116 Minn. 218, 133 N. W. 577; *O'Donnell v. Rhode Island Co.*, 28 R. I. 245, 66 Atl. 578.

The reasoning of these cases is equally applicable in cases of malpractice on the part of the surgeon furnished by the master to his injured servant. In the recent case of *Ross v. Erickson Construction Co.*, 89 Wash. 634, 155 Pac. 153, we held that a right of action for the malpractice of an attending physician upon an injured employee was presumed to be covered by an award under the workman's compensation act; saying that, "the consequences of malpractice is an element which will be considered and compensated for by the state;" basing the conclusion on the accepted doctrine in personal injury cases that malpractice in the treatment of an injury

was so proximately connected with the injury itself as to constitute an element to be considered in any admeasurement of damages. It thus appears to be the settled law of this state that, where the master's negligence makes him liable for the personal injuries of his employee, he is also liable for the malpractice of a physician in the treatment of the injured person.

Conceding malpractice on respondent's part, as charged by the complaint, we think appellant is precluded from a recovery against him. The railway company was liable not only for the injury and resulting suffering of appellant, but also for the malpractice of the attending surgeon and for the expenses of medical attendance. Having that liability in view, the company settled with him, paying him a substantial sum for a release from further liability. At the date of the release, the appellant had already suffered from the alleged malpractice and had employed another surgeon to remedy it, to whom he had paid \$500 for the service. These were all matters that could be enforced against the railway company under its liability for damages, and the settlement was clearly made with a view to covering all those elements of damages. They were known to exist by the parties to the release, and the settlement was made with reference to them. The release having been made in full satisfaction of all existing claims, precludes the appellant from bringing a second action for malpractice against the surgeon, occupying somewhat the position of a joint tortfeasor, to recover double compensation for what he has already been satisfied. It is a well settled doctrine of the law that complete satisfaction for an injury, received from one person in consideration of his release, operates to discharge all who are liable therefor, whether they be joint or several wrongdoers. *Ayer v. Ashmead*, 31 Conn. 447, 83 Am. Dec. 154; *Allen v. Ruland*, 79 Conn. 405, 65 Atl. 188, 118 Am. St. 146; *Dulaney v. Buffum*, 173 Mo. 1, 73 S. W. 125.

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In *Lovejoy v. Murray*, 3 Wall. 1, it is said:

"But when plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages."

The court in *Miller v. Beck*, 108 Iowa 575, 79 N. W. 344, commenting on the foregoing, adds:

"In accordance with this rule, it has frequently been held that the validity and effect of a release of a cause of action does not depend upon the validity of the cause of action, and that if the claim is made against one, and it is satisfied, all who may be liable are discharged, whether the one released be liable or not. *Leddy v. Barney*, 139 Mass. 397, 2 N. E. 107; *Tompkins v. Railway Co.*, 66 Cal. 163, 4 Pac. 1166; *Brown v. City of Cambridge*, 3 Allen (Mass.) 474; *Butler v. Ashworth*, 110 Cal. 614, 43 Pac. 386; *Metz v. Soule*, 40 Iowa 236."

See, also, *Cleveland, C. C. & St. L. R. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485, 131 Am. St. 258.

Here there was a complete satisfaction, and, under the better rule, we think the trial court rightfully decided there could be no recovery.

The judgment is affirmed.

MORRIS, C. J., MOUNT, and CHADWICK, JJ., concur.

ELLIS, J. (dissenting).—It seems to me that the malpractice of a physician is his own act and, if it exists at all, furnishes ground for an independent action. The railroad company performed its duty by selecting a competent physician; but even a competent physician may be negligent, and, if he is negligent to another's injury, I can see no reason why he should not be held to respond in damages. The physician is not a joint tortfeasor. His negligence arises subsequently to the original injury. The release of the railroad company should be held to be no more than a release from the consequences of its own negligence; not from the consequences of the independent negligence of another. I therefore dissent.

[No. 13223. Department One. December 5, 1916.]

S. J. RANDALL, *Appellant*, v. JOHN GERRICK *et al.*,
Respondents.¹

RELEASE AND DISCHARGE—PARTIAL RELEASE—DISCHARGE OF PARTY NOT LIABLE—EFFECT. While a satisfaction of a wrong by one not in fact liable operates as a release of the actual wrongdoer, a party may, for a consideration, release one not liable without releasing the wrongdoer, if the consideration was not in fact accepted as a satisfaction for the injury; there being a distinction between a release and a satisfaction.

SAME—PARTIAL SATISFACTION—INTENTION. Where an action for personal injuries was brought by an employee against a railroad company and an independent contractor for whom plaintiff was working, and upon voluntarily paying a small sum to avoid costs, the railroad company was dismissed because it was found that it was not liable as a joint tortfeasor, the payment from the company does not release the independent contractor, as it was not intended as even a partial satisfaction of the damages.

PARTNERSHIP—RELATION—EVIDENCE—QUESTION FOR JURY. In an action against the firm of G. & G. for personal injuries, the relation of defendant J. as a partner is a question for the jury, although defendants denied that he was a member of the firm, where there was evidence that he hired the plaintiff, looked after part of the work, at one time paid the plaintiff for work and stated that he was interested in the firm, and when, in the course of a year, the firm organized as a corporation, he became the president of the corporation.

Appeal from a judgment of the superior court for King county, Ronald, J., entered May 12, 1915, in favor of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a riveter in bridge construction. Reversed.

John F. Miller, John T. Casey, and Heber McHugh, for appellant.

McClure & McClure and Milo A. Root, for respondents.

¹Reported in 161 Pac. 357.

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Opinion Per FULLERTON, J.

FULLERTON, J.—On October 25, 1910, S. J. Randall, while working for Gerrick & Gerrick as a riveter on a steel bridge in course of construction for the Great Northern Railway Company, was injured in his right eye by a chip or sliver of steel which flew from the end of a riveter. He brought suit for damages against the Great Northern Railway Company, and against John Gerrick, Joseph Gerrick, and H. W. Jack, claiming that these individuals constituted the firm of Gerrick & Gerrick, his employers. After the action had been brought, and after a continuance had been had at the instance of the defendants, the following stipulation was entered into with the defendant railway company:

“It is hereby stipulated by and between the plaintiff and the defendant Great Northern Railway Company, by their respective attorneys, that the cause of action set forth in the complaint herein against the defendant Great Northern Railway Company, has been compromised and settled and the full amount of said compromise and settlement has been paid by said defendant to plaintiff, and it is further stipulated that the above action may be dismissed as against said defendant Great Northern Railway Company and that judgment of dismissal against said company may be entered of record with prejudice to the commencement of another action and against said Great Northern Railway Company for the same cause, and without further costs to either party.”

The railway company was thereupon dismissed as a defendant in the case, and an amended complaint filed on October 14, 1914, against the Gerricks and Jack. On April 2, 1915, a second stipulation was entered into between Randall and the railway company in the following terms:

“It is hereby stipulated and agreed that on or prior to the 15th day of May, 1914, the defendant above named through F. G. Dorety, its counsel, had advised plaintiff’s attorney that plaintiff had not been in the employ of the defendant at the time of receiving the alleged injuries referred to in the complaint in this action but had nevertheless offered to pay plaintiff the sum of one hundred dollars (\$100) in order to avoid

the expense of trial, and particularly of bringing a witness from St. Paul, and that on the date last above mentioned; plaintiff's attorney advised defendant's attorney that plaintiff was unwilling to make any settlement or compromise that would affect any other party to this action and that the sum of one hundred dollars (\$100) was not considered as a reasonable or adequate allowance for plaintiff's injuries or as any more than a nominal payment, but that plaintiff had not much hope of being able to prove that he had been in the employment of the Great Northern Railway Company at the time of said accident, and would therefore discontinue and dismiss said action against said Great Northern Railway Company in consideration of said payment of one hundred dollars (\$100) and that thereupon defendant paid said sum of one hundred dollars (\$100) to plaintiff and that the stipulation of dismissal now on file was thereupon executed, and defendant consents that the stipulation and order of dismissal heretofore filed herein may be modified and amended so far as necessary to accord to the foregoing fact."

Upon this stipulation, the court made the following order:

"It appearing satisfactorily to the court that the above named defendant the Great Northern Railway Company is not a proper or necessary party to the above cause for the reason that the plaintiff was not employed by or on behalf of said Great Northern Railway Company, and it further appearing to the court that the plaintiff was employed by the other defendants only, and that said railway company was made a defendant by mistake; and it further appearing to the court that there is no dispute or issue between the said plaintiff S. J. Randall and the said defendant Great Northern Railway Company, and that the above cause may be discontinued and dismissed as to said defendant, it is hereby

"Ordered, that the stipulation and order of dismissal entered thereon, in the above cause on the 15th day of May, 1914, be and the same is hereby vacated, annulled, set aside and held for naught, and it is further

"Ordered, that the above cause may be, and hereby is discontinued and dismissed against said defendant Great Northern Railway Company, and without costs to plaintiff or said defendant for the foregoing reason, and without prejudice to

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the plaintiff pursuing, and maintaining said cause of action against the other defendants."

On April 15, 1915, the cause came on for trial, and respecting the issue as to one joint tort feisor having been released by Randall, there was the following testimony by Mr. Dorety, attorney for the Great Northern Railway Company:

"We did not consider there was any liability because the plaintiff was not working for the Great Northern Railway Company. We settled with him to avoid costs and not to avoid liability. I informed Mr. Casey, the plaintiff's attorney, that there was no liability on our part, but that we would have to send to St. Paul for a witness unless we were dismissed from the case, and that would probably cost \$100 to bring the witness out; that we would rather pay that amount than to go through the form of a trial."

Randall himself testified on this point as follows:

"I do not recall just what I said to Mr. Dorety, but before I started this action defendants would not give me any information in regard to their relations with the Great Northern Railway Company. My impression was that the Great Northern Railway Company had something to do with the work. After talking with Mr. Dorety I became satisfied that I was not working for the Great Northern Railway Company at all. It was a voluntary offer on their part to pay the hundred dollars and some witness fees; and we accepted it, not as a settlement of the case, but to avoid putting the railway company to the expense of bringing a witness from St. Paul."

The release between plaintiff and the railway company and the original stipulation founded thereon had been offered in evidence, but rejected on the ground that the answer of the Gerricks admitted the employment of plaintiff by themselves. The evidence also showed that plaintiff was not working for the railway company; that Gerrick & Gerrick employed and paid him.

There was contradictory evidence upon the issue as to whether Jack was a member of the firm of Gerrick & Gerrick.

Defendants challenged the sufficiency of the evidence, both when plaintiff rested his case and at the close of all the evidence, but the motions were overruled; the court intimating, however, that if the jury should find a verdict against Jack, he would be inclined to set it aside, or grant a motion for judgment in favor of Jack notwithstanding the verdict. The case was submitted to the jury, and a verdict of \$2,500 returned against all of the defendants. Defendants thereupon moved for judgment *non obstante veredicto*, which was sustained and judgment of dismissal entered as to all the defendants, from which judgment this appeal is taken.

It is the settled rule in this state that the acceptance of money in satisfaction of a claim against one joint tortfeasor, even with a reservation that it is not to be considered as a release of another joint tortfeasor, operates to release the latter. *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 68 Pac. 954, 92 Am. St. 864, 58 L. R. A. 293. The question here is whether the facts of the present case bring it within the rule. We think it presents two elements that distinguish it; first, that the defendant dismissed from the action was not liable as a joint tortfeasor; and second, that the payment made by the dismissed party was in no sense intended by the parties to be applied in satisfaction of the injury to appellant. There seems to be no question other than that respondents were working under an independent contract with the railway company. Respondents employed and paid appellant, and no relation of master and servant existed between him and the railway company. No act or neglect on the part of the railway company contributed to his injury. The injury resulted solely from the negligence of the persons who were his sole and immediate employers. While the authorities maintain the principle that a satisfaction of a wrong by one not in fact liable will operate as a release of the actual wrongdoer (*Martin v. Cunningham*, ante p. 517, 161 Pac. 355), the better doctrine also recognizes the right of a party

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wronged to release one not liable without releasing the wrongdoer, although it may be done for a consideration, if the consideration has not in fact been accepted as a satisfaction for the injury. *Sieber v. Amunson*, 78 Wis. 679, 47 N. W. 1126; *Wardell v. McConnell*, 25 Neb. 558, 41 N. W. 548; *Kentucky & I. Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219; *Missouri, K. & T. R. Co. v. McWherter*, 59 Kan. 345, 53 Pac. 135; *Wagner v. Union Stock Yards & Transit Co.*, 41 Ill. App. 408; *Western Tube Co. v. Zang*, 85 Ill. App. 63; *Thomas v. Central R. Co.*, 194 Pa. St. 511, 45 Atl. 344; *Atlantic Dock Co. v. Mayor etc. of New York*, 53 N. Y. 64; *Iddings v. Citizens' State Bank*, 3 Neb. (Unof.) 750, 92 N. W. 578; *Mathews v. Lawrence*, 1 Denio 212, 43 Am. Dec. 665.

It is true there is a respectable line of authority in support of the contrary doctrine, but we believe the view we have adopted is more in consonance with reason and equity. Even the cases holding to the contrary of the doctrine draw a distinction between a technical release and a satisfaction, basing their decision on the fact that it is the "satisfaction" of a claim by one not liable which releases the wrongdoer, and that a technical or partial release may not so operate. The distinction is stated in *Miller v. Beck & Co.*, 108 Iowa 575, 79 N. W. 344, as follows:

"It is important that we distinguish in this connection between what the law denominates a 'release' and what is called a 'satisfaction.' A release may be given, although no part of the damage has been paid, and a technical release to one who is not a joint wrongdoer will not necessarily release another, who may have had some connection with the wrong. See, as illustrating this rule, *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518 [36 Am. Rep. 830]; *City of Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Long v. Long*, 57 Iowa 497, 10 N. W. 875; *Knapp v. Roche*, 94 N. Y. 329; *Turner v. Hitchcock*, 20 Iowa 310. A satisfaction, however, by whomsoever made, if accepted as such, is a bar to further proceedings on the same cause of action."

A further reason why respondents were not released by the payment received from the railway company is that it cannot possibly be construed as intended for even a partial satisfaction of the claim for damages. After discovery that there was no liability on the part of the railway company, it was agreed to dismiss the action as to them, the company voluntarily agreeing to donate \$100 rather than be put to the expense and delay of bringing a witness from St. Paul, Minnesota, to establish its nonliability. There was no meeting of minds on the subject of satisfaction, but rather one on the matter of costs and expenses, which the company wished to avoid. We do not think the rigor of the rule announced in the *Abb* case is applicable to such a situation. In that case, a satisfaction with one joint tortfeasor was entered into. Here there is an agreement with a stranger to the case, so far as liability is concerned, who pays a small sum, not intended by the parties as a satisfaction of any pretended liability, but for the purpose of allowing such stranger to clear its docket of a pending case whose trial might occasion it vexation and annoyance, but which would not result in subjecting it to damages. The tendency of the courts now is, in cases of joint tortfeasors, to allow it to be shown that a payment made by one wrongdoer was not intended as a satisfaction of the claim against him, and the rule should concededly be more liberal in case of a payment by a stranger to the liability. See *Sloan v. Herrick*, 49 Vt. 327. Further, the agreement in this case, instead of being construed as a release, would fall more nearly under the category of a covenant not to sue, which, by the weight of authority, is not deemed to release a joint tortfeasor, provided no payment is made which partakes of the character of a satisfaction of the claim. *Chicago v. Babcock*, 148 Ill. 358, 32 N. E. 271.

In view of the fact that the release in this case ran to one who was not liable as a tortfeasor, and that the payment made by such released party was made on other grounds than that of a satisfaction of the assumed claim

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against it, we are constrained to hold that such payment did not operate as a release of the real wrongdoer.

The only remaining question is as to the liability of Jack as a partner in the firm of Gerrick & Gerrick. The Gerricks and Jack testified there was no such relationship, that Jack occupied the office adjoining them and looked after some matters in their absence. As controverting this, appellant and another witness testified that Jack hired them to go upon the bridge job where the injury occurred; that he was up there to look at the work; that a check given by Gerrick & Gerrick to appellant could not be cashed and Jack substituted his personal check and told appellant that he was interested in the firm. The evidence further shows that, in the course of the year following the injury, the firm of Gerrick & Gerrick was organized into a corporation, of which Jack became the president. We think the evidence was sufficient to present a question to the jury as to whether Jack was in fact a partner in the firm of Gerrick & Gerrick at the time of appellant's employment and injury. *Providence Mach. Co. v. Browning*, 68 S. C. 1, 46 S. E. 550; *In re Beckwith & Co.*, 130 Fed. 475.

The judgment notwithstanding verdict is reversed, with instructions to the trial court to enter judgment on the verdict.

MOUNT, ELLIS, and CHADWICK, JJ., concur.

[No. 13441. Department One. December 5, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE P.
ROSSMAN, *Appellant*.¹

STATUTES—CONSTRUCTION—"WORKER." A stenographer and book-keeper is a "worker" within the meaning of initiative measure No. 8 (Rem. 1915 Code, § 6565-1 *et seq.*) making it unlawful for employment agencies to charge a fee or remuneration for furnishing employment to "workers."

SAME—VALIDITY—DEFINITENESS—"WORKERS." The word "worker" in initiative measure No. 8 (Rem. 1915 Code, § 6565-1 *et seq.*) making it unlawful for employment agencies to charge a fee or remuneration for furnishing employment to "workers," is not so indefinite as to render the act void or so wanting in certainty that it could not support a criminal charge for its violation.

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF BUSINESS—EMPLOYMENT AGENCIES. It is within the police power of the state to prohibit employment agencies from charging any fee or remuneration for furnishing employment to workers, and initiative measure No. 8 (Rem. 1915 Code, § 6565-1 *et seq.*) is therefore not unconstitutional as in violation of the fifth and fourteenth amendments to the Federal constitution.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 3, 1916, upon a trial and conviction of violating the employment agency law. Affirmed.

Edgar S. Hadley, for appellant.

Alfred H. Lundin and *Lane Summers*, for respondent.

MOUNT, J.—The defendant was convicted of the crime of charging a fee for furnishing employment or information leading thereto. He has appealed from the sentence imposed upon that conviction.

The facts are stipulated in substance as follows: The defendant was operating an agency for the employment of stenographers and bookkeepers, and was charging a fee of two dollars as an enrollment fee, and twenty per cent of the

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first month's salary after the applicant secured employment. On the 14th day of February, 1916, the appellant demanded and received from one Elnora Hughes the sum of two dollars. She was then seeking employment as a stenographer and bookkeeper.

The appellant makes three contentions in this court, to the effect: First, That a stenographer and bookkeeper is not a worker within the meaning of initiative measure No. 8 (Rem. 1915 Code, § 6565-1 *et seq.*). Second, That the word "worker" is so indefinite as to render the act void. And third, That the act is unconstitutional under the fifth and fourteenth amendments to the constitution of the United States, and like provisions of the constitution of this state. We shall notice these contentions briefly.

On the first point, the appellant relies upon the case of *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, where we held that a school teacher was not a worker within the meaning of that act. In that case, at page 680, we said:

"The act has no reasonable relation to any subject other than the protection of those who may be classed as workers or laborers. It has never been contended that business and professional men, teachers, and those following scientific pursuits, are not amply equipped to protect themselves. A teacher renders the very highest class of professional service, whereas, those for whose benefit this law was passed are frequently unskilled in business affairs, and in many instances are men of foreign birth having no competent understanding of our business methods or our language."

It is contended by the appellant that a stenographer and bookkeeper, for the reasons stated in *Huntworth v. Tanner*, *supra*, is not included within the meaning of the term "worker." Some things there said might lead to that conclusion. But we are satisfied that a stenographer and bookkeeper is a worker and, therefore, comes within the meaning of the act (Rem. 1915 Code, § 6565-1 *et seq.*).

In Georgia, in a case where a man was employed as a private secretary and stenographer to the president of a rail-

road and banking company at \$125 per month, his duties being to receive dictation and transcribe letters, and to take care of the papers in the office, including the keeping of books and statements, it was held that he was a worker, and was entitled to have his wages exempt from garnishment. *Abrahams v. Anderson*, 80 Ga. 570, 5 S. E. 778, 12 Am. St. 274. And in *Cohen v. Aldrich*, 5 Ga. App. 256, 62 S. E. 1015, also a Georgia case, a stenographer was also held to be a worker. In that case it was said:

"That a stenographer is skilled and trained cannot affect the nature of the work he does, although it does affect its character. After acquiring the trade, the test is the method of carrying it on. It is difficult to conceive of anything more thoroughly manual than the work of a stenographer. Receiving the sounds from the lips of another, he registers what he hears and reproduces what he receives. He exercises no independence of thought, no initiative, no discretion. The test of his efficiency is his absolute acceptance of what is given him and its return unchanged. If his employer indulges in the pastime of murdering the King's English, he must become a 'particeps criminis,' and join in the assassination. So pronouncedly are the physical faculties involved in stenography that there comes a time when the hand refuses to work, although the mental faculties may be entirely clear. It is pre-eminently manual labor, work of the hand."

Under the rule in these cases, and others of a similar character which might be cited, we are satisfied that a stenographer and bookkeeper is a worker within the common acceptation of that term, and is within the meaning of initiative measure No. 8 (Rem. 1915 Code, § 6565-1 *et seq.*).

It is next contended that the term "worker" is so indefinite as to render the act void. This contention is based upon the decision in *State v. Powles & Co.*, 90 Wash. 112, 155 Pac. 774. In that case, we held that the term "commission merchant," which was defined to be "any person, firm, or corporation whose principal business is the sale of farm, dairy, orchard or garden produce on account of the shipper or consignor," was too indefinite to base a criminal charge upon by

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reason of the use of the words "principal business." But it was not held there that the words "commission business," if they had been used alone, were not capable of accurate definition. But because the word "principal" was used, it was held that it could not be determined with accuracy what the principal business of a commission merchant might be.

The word "worker" is capable of definite definition and is readily understood. We think there is no merit in the contention that the act is void for indefiniteness because of the use of the word "worker."

It is next contended that the act is unconstitutional because it is not within the police power of the state to regulate or interfere with the right of a private citizen to pursue a lawful business. In the case of *Huntworth v. Tanner, supra*, we reserved the constitutional question because, in that case, it was not necessary to determine that question, for we held that a school teacher was not a worker within the meaning of the act. The question now presented is whether this act is within the police power of the state.

A number of cases are cited by the appellant to the effect that a citizen is guaranteed the protection of his property and the pursuit of his happiness under the constitution of the United States, and that any person is at liberty to pursue any lawful calling, and to do so in his own way when not encroaching upon the rights of others; and it is contended that the police power of the state does not extend to the right to take away or regulate a lawful business. There can be no doubt of the right of a citizen to pursue a lawful calling in a lawful way. But it is equally true that there can be no doubt of the right of the state, through its legislature, to regulate a business which may become unlawful by improper and unlawful means.

In *Munn v. Illinois*, 94 U. S. 113, at page 124, it was said:

"When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. . . .

From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, 'are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."

In *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, this court said:

"Having in mind the sovereignty of the state, it would be folly to define the term. To define is to limit that which from the nature of things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The police power is to the public what the law of necessity is to the individual. It is comprehended in the maxim *salus populi suprema lex*. It is not a rule, it is an evolution."

In *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916 A 209, in discussing the police power of the state, this court said:

"If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason. If no state of circumstances could exist to justify the statute, then it may be declared void because in excess of the legislative power."

And in *Munn v. Illinois*, *supra*, at page 132 of 94 U. S., the supreme court of the United States said:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference

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within the scope of legislative power, the legislature is the exclusive judge."

And in *McLean v. Arkansas*, 211 U. S. 539, at page 548, it was said:

"If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

In *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 177, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, we said:

"The test of the validity of such a law is not found in the inquiry, Does it do the objectionable thing? but is found rather in the inquiry, Is there no reasonable ground to believe that the public safety, health or general welfare is promoted thereby? The legislature cannot, of course, without violating this clause of the constitution, declare a particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employees engaged in it, the people surrounding it, or to any considerable number of the people at large, no matter from whatsoever cause the menace may arise."

We think there can be no doubt of the principles enunciated in the foregoing quotations. In the *Huntworth* case, *supra*, the reason for this act was pointed out. We there said, at page 679:

"The mischief inducing the present act is not hard to find. It was to correct what society had come to regard as a wrong practiced upon those who for many reasons were unable to protect themselves against impositions and extortions. It was to protect a class that was powerless under existing conditions to protect itself. As said by the supreme court of the United States in *Patterson v. Bark Eudora*, 190 U. S.

169, when speaking of the Federal statute prohibiting any person from demanding or receiving remuneration for providing employment for sailors:

"The story of the wrongs done to sailors in the larger ports, not merely of the nation but of the world, is an oft-told tale."

"Or, as the court of appeals of New York said when considering the constitutionality of a statute regulating employment agencies:

"The legislature had the right to take notice of the fact that such agencies are places where emigrants and ignorant people frequently resort to obtain employment and to procure information. The relations of a person so consulting an agency of this character with the managers or persons conducting it are such as to afford great opportunities for fraud and oppression, and the statute in question was for the purpose of preventing such frauds and, probably, for the suppression of immorality.' *People ex rel. Armstrong v. Warden of City Prison*, 188 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859."

And quoting from *Moore v. Minneapolis*, 43 Minn. 418, 45 N. W. 719, we said:

"The nature of the business, and the character of those with whom the business is likely to be conducted, in point of intelligence, experience, and capacity for self-protection from fraudulent practices, are such that it might well be deemed necessary by the legislature, as a matter of proper police regulation . . . The propriety of police regulation seems apparent when it is considered that, by means of such agencies, ignorant and credulous persons might easily be defrauded of their money under a mere pretense of employment to be afforded them in a distant part of the state, so that the fraud would not be discovered until the victim should have gone so far away as to be unlikely to trouble the fraudulent agent by prosecution.'"

We then said:

"Furthermore, the act must be determined by a consideration of its natural effect when put in operation. In operation it may tend to protect the day laborer who, as said by the examiner in the office of the labor commissioner of the city

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of Seattle, 'is generally poor and without means' (*Wiseman v. Tanner*, 221 Fed. 694), and who, in consideration of a fee, is directed to a job which may not exist, or which may not endure because of collusion between the employment agent and a corrupt foreman."

It is apparent, from these quotations from *Huntworth v. Tanner*, *supra*, that the act, and the purposes for which it was enacted, were to prevent frauds which had become common in the class of business to which the act relates, and was, therefore, under the authorities above cited, within the police power of the state to regulate, and even suppress, to the extent, at least, of the frauds. The constitutionality of this act was upheld in *Wiseman v. Tanner*, 221 Fed. 694, where all the authorities cited in the appellant's brief, and many not therein cited, were considered.

It is further argued by the appellant that the act is prohibitive of the business, and therefore is unconstitutional. This contention, we think, is without merit, because the act does not prohibit the business. Section 2 of the act, Laws of 1915, p. 1 (Rem. 1915 Code, § 6565-2), makes it unlawful for any employment agent to demand or receive fees from persons seeking employment. It does not prohibit the business. Fees, of course, may be charged against persons desiring to employ laborers. We are of the opinion that the act is a valid exercise of the police power, and is not unconstitutional upon either ground.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., CHADWICK, and FULLERTON, JJ., concur.

ELLIS, J., concurs in the result.

[No. 13561. Department One. December 5, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v.

ARTHUR R. WHEELER, *Appellant*.¹

ADULTERY—EVIDENCE—PROOF OF MARRIAGE—SUFFICIENCY. In a prosecution for adultery, marriage is an essential element of the crime and cannot be inferred from circumstances; and a conviction cannot be sustained where there was no evidence that the person performing the ceremony was authorized by law to do so.

SAME. Upon a prosecution for adultery, a statement by defendant's attorney, during the progress of the examination of a witness, that a person who performed the marriage ceremony "used to be a justice of the peace" is not an admission and does not dispense with the necessity of proof of authority to perform the ceremony.

CRIMINAL LAW—TRIAL—DISMISSAL—MOTION—SUFFICIENCY. A motion to dismiss a criminal case upon the general ground of insufficiency of the evidence is bad, as there is no nonsuit in a criminal case; and is insufficient as a motion to direct a verdict of acquittal, since it fails to point out the particular matter as to which there was a failure of proof (CHADWICK, J., dissenting).

CRIMINAL LAW—TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS. In a prosecution for adultery, it is an encroachment upon the province of the jury and reversible error to instruct, "if from the evidence of the opportunity and from other evidence of a disposition of the parties," etc., where there was no evidence of such disposition etc., as it, in effect, tells the jury that there was direct evidence thereof, in the opinion of the court.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered February 14, 1916, upon a trial and conviction of adultery. Reversed.

W. H. Cameron and Hayden, Langhorne & Metzger, for appellant.

C. A. Studebaker and W. O. Grimm, for respondent.

MAIN, J.—The defendant in this case is charged with the crime of adultery. It is alleged in the information that the crime was committed on the 9th day of November, 1915,

¹Reported in 161 Pac. 373.

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with one Louisa Wirsdorfer, who was then the wife of Mathias Wirsdorfer. At the time alleged, Mrs. Wirsdorfer was living separate and apart from her husband, and was conducting in the city of Centralia a rooming house known as the Lenox Hotel. From some time early in the month of September, 1915, until after the offense is alleged to have been committed, the defendant was a roomer and boarder at the hotel. The trial of the defendant upon the charge stated in the information resulted in a verdict of guilty. Motion for a new trial being made and overruled, judgment was entered upon the verdict, from which this appeal is prosecuted. The first question is whether the state offered sufficient evidence to *prima facie* establish that Louisa Wirsdorfer and Mathias Wirsdorfer had been previously married. Mathias Wirsdorfer testified that he and Louisa Wirsdorfer were married in the year 1892, in the city of Chehalis. After this general testimony as to marriage was offered, the same witness testified as follows:

"Q. Going back to your marriage again, by whom were you married? A. By Maaker. Q. Do you remember his name? A. Yes, sir. Q. His initials? A. Maaker used to be a dentist here. Mr. Langhorne: Dr. E. A. Maaker, he used to be a dentist and justice of the peace here. Court: I think I have heard of him myself."

No other evidence of the marriage, nor of the fact that E. A. Maaker was a justice of the peace at the time the ceremony is claimed to have been performed, was offered. From this testimony, it does not appear that Maaker was a justice of the peace when it is said he performed the marriage ceremony. Where the charge is adultery, marriage is an essential element of the crime. Rem. 1915 Code, § 2457; *Buchanan v. State*, 55 Ala. 154; *Banks v. State*, 96 Ala. 78, 11 South. 404. In such a case, marriage in fact, as distinguished from one inferable from circumstances, must be proven. 1 Wharton, Criminal Evidence (10th ed.), p. 405; *Miner v. People*, 58 Ill. 59.

The reason for this rule is that a marriage inferable from circumstances is based upon a presumption, and, in a criminal action, this presumption is met by the stronger presumption of the defendant's innocence. The law upon this question cannot be better stated than by quoting an excerpt from the opinion in the case of *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84. It was there stated:

"A valid marriage may be presumed to exist from general reputation among the acquaintances of the parties that such is the fact, when that reputation is accompanied by their cohabitation, and arises from their holding themselves out to the world as occupying that relation to which the law refers when marriage is mentioned. *Wallace's Case*, 49 N. J. Eq. 530, 25 Atl. 260; *White v. White*, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; *Murray v. Murray*, 6 Ore. 26; *Arthur v. Broadnax*, 3 Ala. 557, 37 Am. Dec. 707; Underhill, Evidence, p. 158, § 114. The exception to the rule that marriage may be presumed from evidence of cohabitation and repute is where a public or criminal offense is involved. The exception is based upon the ground that the presumption of marriage without proof of actual marriage cannot overcome the stronger presumption of innocence. *White v. White, supra*; *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 742; Stewart, Marriage & Divorce, § 126."

Where marriage is an essential element of the crime charged, it is necessary that there be some evidence showing that the person performing the ceremony was authorized to perform such functions at the time. Underhill, Criminal Evidence (2d ed.), page 661; *State v. Hodgskins*, 19 Me. 155, 36 Am. Dec. 742; *State v. Bowe*, 61 Me. 171.

In the case last cited, it was said:

"But we do not think the few words uttered by Hannah A. Littlefield amount to proof of a legal marriage on her part. It does not even appear that this marriage was solemnized by any one 'professing' to be either 'a justice of the peace or an ordained or licensed minister of the gospel . . .'"

In the present case, there is no evidence that Maaker was a justice of the peace at the time the ceremony was per-

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formed. It is claimed, however, that the statement of counsel for the defendant, as appears in the excerpt from the record above quoted, amounts to an admission that Maaker was, at the time of the marriage, a justice of the peace. The statement of counsel does not admit that Maaker was a justice of the peace at the time, and was not made as an admission. It was a mere voluntary statement, suggesting that, at one time, Maaker was a dentist and a justice of the peace. An admission by an attorney to be binding upon his client must be distinct and formal, and made for the express purpose of dispensing with the formal proof of some fact at the trial. 1 Greenleaf, Evidence (16th ed.), § 186; 1 Ency. of Evidence, p. 561; *Treadway v. S. C. & St. P. R. Co.*, 40 Iowa 526; *Davidson v. Gifford*, 100 N. C. 18, 6 S. E. 718. The case of *State v. Nelson*, 39 Wash. 221, 81 Pac. 721, is distinguishable. There the testimony offered tended to show a marriage by a minister of the gospel.

But even though the marriage was not sufficiently proven, it does not follow in this case that the action now should be ordered dismissed. At the conclusion of the state's case, the defendant moved that the action be dismissed upon the grounds "that the evidence is totally insufficient to justify the submission of the case to the jury . . ." This motion does not invite the court to direct a verdict of acquittal, but is, in form, a motion for dismissal, and is referred to in the briefs as a motion for nonsuit. In *State v. Hyde*, 22 Wash. 551, 61 Pac. 719, it was said:

"There can be no non-suit in a criminal, as in a civil, case. Bishop, New Criminal Procedure, § 961. The proper practice is to ask the court to direct an acquittal."

Treating the motion, notwithstanding its form, as a motion addressed to the court to direct an acquittal, it was yet insufficient, because it nowhere pointed out wherein the evidence was insufficient, but was a general challenge of the sufficiency thereof. In motions of this character, the attention of the court should be directed to the precise point made

and the grounds therefor. Quoting further from the *Hyde* case on this question, it is said:

"This motion is a general one, and only challenges the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence. Upon a motion of this kind, the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence fails in some particular matters. The record fails to disclose that the objection to the evidence in the particular matter, as to the kind, amount, and value of money, was called to the attention of the court, and in a case of this kind the motion should direct the attention of the court and opposite counsel to the precise point made and the grounds therefor."

The objections made to the instructions will next be noticed. Instruction number three concluded with this sentence:

"If from the evidence of the opportunity at that time, and from other evidence of a disposition of the parties to indulge in sexual intercourse between themselves and from all other facts and circumstances proven on the trial you are satisfied beyond a reasonable doubt that at the time and place, set out in the information, they had sexual intercourse, then this is sufficient."

There was another instruction of similar import. In the quoted part of the instruction, the court, in effect, told the jury that there was "evidence of a disposition of the parties to indulge in sexual intercourse between themselves." There is no direct evidence which shows or tends to show a disposition of the parties to indulge in sexual intercourse between themselves. It may be that there was evidence from which the jury had a right to infer such disposition. Had the court told the jury that if they found from the evidence that the parties had a disposition to indulge in sexual intercourse between themselves, this fact should, with all the other evidence in the case, be considered in determining the guilt or innocence of the accused, a different question would be presented. The way the instruction reads, the jury could not well have

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understood it differently than that, in the opinion of the court, there was direct evidence of such disposition. So instructing the jury was an encroachment upon § 16 of art. 4 of the constitution of this state, and was therefore reversible error.

It is also claimed that error was committed in failing to instruct the jury with sufficient definiteness that, unless they found the act charged to have been committed on the 9th day of November, 1915, the verdict should be one of acquittal. During the trial, the state elected to ask for a conviction on account of the act charged to have been committed upon the date mentioned. While the instructions in this regard are, possibly, not as definite as they should have been, yet, when the entire charge is read, it does not seem that the jury could have been misled thereby, or misunderstood the court's meaning. The other errors assigned are such as are not likely to appear upon another trial of the cause, and for that reason, will not be here reviewed. The judgment will be reversed, and the cause remanded with direction to the superior court to grant a new trial.

MORRIS, C. J., PARKER, and ELLIS, JJ., concur.

CHADWICK, J. (dissenting)—This case is distinguishable from the case of *State v. Hyde*. The objection was "called to the attention of the court" and no purpose could be served by repeating it at the time of making the motion at the close of the testimony. The testimony failed in a material particular, and defendant should have been acquitted.

[No. 13661. Department One. December 5, 1916.]

SHERWOOD BROTHERS, INCORPORATED, *Respondent*, v.
SEATTLE FRUIT & PRODUCE AUCTION COMPANY,
Appellant.¹

FACTORS—COMMISSIONS—CONTRACT—EVIDENCE—FINDINGS. Where parties disagreed as to the terms of a special contract for the sale of goods on commission, the fact that the court did not find the contract exactly as claimed by either party, but adopted the testimony of each in part, does not amount to a finding that there was no meeting of the minds upon any definite contract.

SAME—AUTHORITY—EMPLOYING SUBAGENTS. A factor operating under an express contract to market fruit for a commission has no power to employ subagents at the owner's expense and deduct their commissions, and the power is not implied from the mere fact of employment.

SAME—COMMISSIONS—CONTRACT—EVIDENCE—SUFFICIENCY. Findings that fruit was to be marketed for a specified commission, without deductions for the commissions of subagents in the east, are sustained where that version of the contract was corroborated by the fact that the amount of such deductions was not agreed upon when the contract was made, and that both the fact and the amount of the deductions made were persistently concealed in making statements of all the other expenses incurred.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 15, 1916, upon findings in favor of the plaintiffs, in an action for an accounting, tried to the court. Affirmed.

Flick & Frater, for appellant.

Wettrick, Anderson & Wettrick and *Brown, Peringer & Thomas*, for respondent.

ELLIS, J.—Plaintiff, a commission merchant of Bellingham, Washington, brought this action against defendant, a commission merchant of Seattle, to recover a balance claimed to be due as the proceeds of the sale of certain berries and other small fruits shipped by plaintiff to defendant

¹Reported in 161 Pac. 371.

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at Grand Forks, North Dakota, for sale on commission. There were three car loads of fruit, shipped, respectively, June 25, June 30, and July 2, 1915, by express from Bellingham, consigned to defendant at Grand Forks. The fruit was delivered at that point to defendant's agent, to whom the bills of lading were forwarded. Though a conversion was claimed as to the last car, at the trial the action resolved itself into one for an accounting.

We find it unnecessary to review the pleadings. Both sides claimed that the shipments were made under an express oral agreement entered into between plaintiff and defendant early in June, 1915, at Bellingham, through S. A. Sherwood, plaintiff's president, and George Bryant, defendant's president. There was a sharp conflict in the evidence as to the terms of this agreement. Sherwood testified, in substance, that it was agreed that defendant would handle the berries for a commission of ten cents a case and ten per cent for the other fruits, and would guarantee one dollar a case for the berries, but that nothing was said as to any commission to be charged by any broker in the Dakotas, where it was contemplated the fruit would be marketed. Bryant testified to the effect that defendant was to receive as its commission ten per cent of the net returns to Seattle, that there was no guaranty, and that it was understood that whatever commission was necessary would be charged and deducted as an item of expense at the other end. The evidence showed that the berries and other fruits were sold to the retail trade in the Dakotas by defendant through O. J. Barnes & Company, a commission house at Grand Forks, North Dakota, and that Barnes & Company received a commission of fifteen per cent. The sale statements rendered by defendant to plaintiff did not disclose the fact that any commission was deducted for marketing the fruit in the Dakotas. It fairly appears that plaintiff did not know that Barnes & Company had anything to do with the matter until late in August,

1915, some time after statements on all the sales had been rendered, and did not know that any commission, save defendant's ten per cent, had been deducted until certain depositions were taken at Grand Forks late in December, 1915.

The trial court did not find the contract wholly in accordance with the claims of either party, but expressed the view that the agreed commission was ten per cent on the net proceeds of all of the berries and fruit; that there was a guaranty of one dollar a case only as to the first car, which guaranty was met, and that there was no agreement authorizing defendant to deduct any commission paid to the Dakota broker. Judgment was rendered for plaintiff for the sum of \$1,149.75, which, it seems to be conceded, is the amount which was deducted as the commissions of Barnes & Company, and for costs. Defendant appealed.

Because the court did not find wholly with the claims of either party, appellant first contends that the court, in substance, found that there was no definite contract, in that there was no meeting of the minds of the parties, and that, therefore, appellant was entitled to a reasonable compensation for its services; hence was warranted in deducting the commissions paid in Dakota, with the express charges and other usual marketing expense, and in retaining ten per cent of the resulting net proceeds. This position is not tenable. Both parties asserted that there was a special contract. They disagreed only as to its terms. What its terms were was the specific question for the court's determination. The fact that the court did not find the agreement exactly as claimed by either party, but found as to one part with the appellant's evidence and as to another part with the respondent's evidence, was not a finding, as the appellant asserts, that the minds of the parties never met. There is no rule of law requiring the court, on any controverted question of fact, to adopt as true *in toto* the evidence on either side, or as an alternative, find the evidence on both

sides false *in toto*. The purpose of trying questions of fact is to determine the truth from all of the evidence.

It is next contended that the court committed fatal error in holding that the burden of proof was upon appellant to show an agreement on respondent's part that the commission of fifteen per cent paid to the Dakota broker should be deducted as an expense chargeable to respondent. Appellant was admittedly respondent's agent operating under an express contract to market the fruit for a commission. In the absence of specific authority, it had no power to employ subagents at respondent's expense. That authority cannot be implied from the mere fact of appellant's employment. *Vashon Fruit Union v. Godwin & Co.*, 87 Wash. 384, 151 Pac. 797; *Fudge v. Seckner Contracting Co.*, 80 Ill. App. 35; *Burke v. Frye*, 44 Neb. 223, 62 N. W. 476; *People's Bank of Pratt v. Frick Co.*, 13 Okl. 179, 73 Pac. 949. The burden was, therefore, upon appellant to show that, by the terms of its employment, it was authorized to employ subagents and charge a commission for their services. The court committed no error in so holding.

Finally, it is contended that, in any event, the evidence clearly established the contract as claimed by appellant. As to whether it was understood that appellant would market the fruit through commission merchants, and would charge as an expense the commission paid to such merchants, the direct evidence, as we have noted, was in the sharpest conflict. The court was justified, therefore, in taking into consideration every circumstance tending to support either side. If in the original negotiations respondent's president was advised that it would have to bear the commission of a broker in the middle west, it is inconceivable that he would not have asked what that commission would be and insisted upon something more definite than appellant's version of the agreement. It is a further significant fact that the accounts of sales rendered by appellant to respondent, which are in evidence as exhibits, show that, though the transportation

charges, drayage, labor and repacking charges were frankly disclosed and deducted as legitimate expenses, and, also, appellant's ten per cent commission on the balance, no commission to the Dakota broker was shown, either as an expense or otherwise, nor on the face of the statements deducted. An examination of the statements fails utterly to disclose that any commission whatever, save appellant's ten per cent, was paid to any one. Whatever the contract, good faith would dictate that these commissions paid at the other end should be shown if deducted, as they admittedly were. It seems only reasonable that, had respondent ever agreed to bear these commissions, as appellant claims it did, they would have been shown, just as other deductible expenses were shown. That they were not shown raises a strong inference that appellant desired to conceal the fact that they had been paid and deducted from the gross proceeds, lest respondent might object.

In other relations involving agency, such a clandestine course of conduct would be considered at least questionable, and we know of no reason why it is less so where the parties are commission merchants. The rule requiring open disclosure and full accounting has its basis in considerations of common honesty, and applies to commission merchants as well as to others. Here the concealment was persistent. Throughout the correspondence, though Barnes was sometimes mentioned, he was referred to as "our representative," never as an independent broker to whom a commission was paid. Appellant's answer to interrogatories propounded by respondent late in November, 1915, stated, with regard to each car, that the fruit was "sold to O. J. Barnes," not that it was consigned for sale on commission. So far as the record before us indicates, the fact that a commission was paid and in what amount did not appear until the deposition of Barnes was taken, in which it was disclosed that Barnes & Company had taken the berries on commission and had actually charged a commission of fifteen per cent for which ap-

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pellant did not account. It is no answer to say that it is inequitable that appellant should refund commissions which it actually paid in sums larger than the commissions which it received and that respondent, in any event, received the full market price for its berries. Appellant, at all times, knew its own facilities for disposing of the berries better than any one else knew them. If it wanted to avoid the dispute here presented, it should have disclosed the facts when it made the contract, and then advised respondent that the added commission would be charged as expenses. That it did not do so is positively asserted by respondent and is strongly corroborated by the studied course of concealment, both of the fact and of the amount of commissions charged at the other end. Upon the whole record, we cannot say that the evidence preponderates against the court's findings. The court having found that there was no contract authorizing the deduction of these commissions, the case falls distinctly within our decision in *Vashon Fruit Union v. Godwin & Co.*, *supra*.

The judgment is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and CHADWICK, JJ., concur.

[No. 13662. Department One. December 5, 1916.]

FRANK S. SHAW *et al.*, *Appellants*, v. GEORGE W. CARR *et al.*,
Respondents.¹

CORPORATIONS—STOCK—SALE—RESCISSION—FRAUD—EVIDENCE—SUFFICIENCY. A rescission of sale of stock for fraud is properly refused where it is not shown by clear and convincing evidence that plaintiffs were overreached in a business venture which they believed would be successful after full opportunity to investigate and after full inquiry.

SAME—CAPITAL STOCK—IMPAIRMENT—GIFT TO CORPORATION—VALIDITY. Where promoters of a corporation had received all of the stock as fully paid up in consideration of rights and property transferred to the corporation, they may lawfully make a gift of part of the stock to the corporation to be sold for its benefit as treasury stock; and such return of stock is not void as an impairment of the capital stock in violation of Rem. 1915 Code, § 3697.

SAME—SALE OF STOCK—RESCISSION—FRAUD—EVIDENCE—SUFFICIENCY. Evidence that a company failed to meet its expectations as to the practicability and salability of a machine does not warrant a finding of fraud in the sale of stock, where there was other evidence that the machines were practicable and that the failure of the company was due to want of sufficient working capital.

Appeal from a judgment of the superior court for King county, Jurey, J., entered March 1, 1916, upon findings in favor of the defendants, in an action for rescission, tried to the court. Affirmed.

H. E. Foster, for appellants.

Flick & Frater (C. Dell Floyd, of counsel), for respondents.

CHADWICK, J.—Plaintiffs brought this action for the recovery from defendants of the sum of two hundred and fifty dollars which had been paid to defendants in money; the cancellation of two promissory notes, one for \$250, and one for \$1,000; and for the cancellation and surrender of two deeds whereby plaintiffs conveyed to a corporation known as

¹Reported in 161 Pac. 345.

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the Modern Irrigation Company two certain tracts of land in King county.

The corporation was organized by certain of the defendants. It is alleged that defendants Carr, Jones, and Anderson fraudulently contrived, by misrepresentation and fraudulent statements and concealments, to sell to plaintiffs five thousand shares of the stock of the irrigation company in consideration of the sum of three thousand dollars, to be paid as above indicated. The court found in favor of the defendants. Two issues, one of fact, the other of law, are submitted by the appellants. The testimony is conflicting. The charge is fraud. From an examination of the entire statement of the facts, we are not prepared to say that the preponderance is not with respondents. It is certainly not shown by clear and convincing evidence that appellants were overreached. It must have occurred to the trial court, as it does to us, that appellants, after full opportunity to investigate and after full inquiry, engaged in a business venture which, at the time, seemed inviting, but which had only such prospects of success as were inspired by optimism.

The venture was not a success. Its failure is attributable, as it seems to us, to a lack of sufficient capital to manufacture and market its wares. We shall not go into an extended review of the testimony. It is enough that a broad view of the entire record has failed to convince us that appellants were induced to purchase the stock by any wilfully fraudulent inducements on the part of the respondents.

The irrigation company was organized with a capital stock of \$50,000. The organizers—two of them—had certain contracts giving them the privilege of manufacturing, for a term of five years, a certain water motor and pump which, it was believed, had proved its practicability by actual test. There were also some physical assets in the way of motors and pumps, of no greater probable value than \$2,000. Carr and Jones transferred their contracts and the personal property to the corporation in full payment of the capital stock,

all of which, except a nominal holding to Anderson, was issued to them in equal proportion. Whereupon, in order to provide a working capital for the company, the two incorporators mentioned, voluntarily and without consideration or obligation on their part, turned back into the treasury of the corporation 32,000 shares of the stock, to be held by it in trust and sold for the benefit and use of the corporation.

The stock which appellants purchased was a part of this stock. It is insisted that this retransfer of the stock was a fraudulent manipulation; a dealing in its own stock by the corporation, and an impairment of its capital stock under the rule announced in *Barto v. Nix*, 15 Wash. 563, 46 Pac. 1033; *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364; *Union Trust Co. v. Amery*, 67 Wash. 1, 120 Pac. 539; *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 133 Pac. 465, 46 L. R. A. (N. S.) 637; *Kom v. Cody Detective Agency*, 76 Wash. 540, 136 Pac. 1155, 50 L. R. A. (N. S.) 1073; and that the stock, being, for these reasons, fictitious and fraudulent, no consideration passed to appellants, and they are entitled to a personal judgment against the principal respondents and a reconveyance of the property transferred by them to the present holders of the title, who are alleged to have taken with notice.

The cases cited are all declarative of our statute, Rem. 1915 Code, § 3697, which discountenances an impairment of the capital stock of a corporation at the expense of its assets. The statute does not declare, and we know of no rule of public policy that would require a holding, that a corporation cannot acquire, by gift and for its own benefit, shares that had theretofore been issued to an individual. The vice at which the statute is directed is the disbursement of the acquired assets of a company in the purchase of its own stock. If that could be done, it would readily follow that the directors of a corporation might, in consideration of a retransfer of their stock, keep themselves financially whole, leaving nothing to the creditors. Or, to put it another way, the stock is only

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representative of the money worth of the corporation. If a trade in the stock impairs the money worth of the stock, it is proscribed. If it does not, it is not an unlawful thing.

That a return by a person of a part of the stock which had been issued to him, to be used for the benefit of the corporation, is not illegal was held in effect in *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914 B. 750, where we quoted from 1 Cook, Stock and Stockholders (3d ed.), p. 66, § 46, as follows:

"The fact that the person to whom the stock is issued returns a part of it as a gift to the corporation or to trustees for the corporation to sell the same below par and put the proceeds in the corporate treasury for a working capital does not necessarily prove that the property was overvalued. The person receiving the stock may have been willing to sacrifice a part of his stock and property in order to make the rest more valuable."

Appellants make much of a finding of the court that the agreement giving the irrigation company the exclusive right to manufacture the motor and a "square hole bit" was, at the time appellants purchased the stock, and is now, worth the sum of \$50,000; whereas it is, and was, utterly worthless. To measure the value of such a contract is exceedingly difficult. For that reason, we have followed the rule, where the facts invite it, of *Old Dominion Copper Min. & Smelting Co. v. Lewisohn*, 210 U. S. 206. In *Inland Nursery & Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499, we said:

"Fraud to be actionable must result in injury, and it nowhere appears that injury has resulted to any one because of such exchange. It does not appear but that subsequent stockholders purchased with full opportunity for investigation into the condition and assets of the company, and that the stock they purchased was fully worth the sum paid therefor. If, therefore, subsequent stockholders obtained full value, there can be no element of injury or fraud as to them. No complaint is made as to creditors."

A fair reading of the testimony discloses the fact that appellants did not invest because of any allurement attributable

to the amount of the capital stock measured in dollars. They knew the success of the company depended upon the manufacture and sale of a new and novel article. They invested because they believed in the practicability and salability of the machine. Their testimony reaches no further than to show that the company has failed to meet their expectations. On the other hand, there is the testimony of engineers and others, whose judgment is not impeached, that the machine is entirely practicable, while the whole testimony shows that the company has so far failed for the want of a sufficient working capital.

We find no error, and the judgment is affirmed.

MORRIS, C. J., MAIN, HOLCOMB, and ELLIS, JJ., concur.

[No. 13270. Department Two. December 6, 1916.]

EDENDALE LAND COMPANY, *Appellant*, v. JAMES J. MORGAN
et al., *Respondents*.¹

WATERS AND WATER COURSES—APPROPRIATION—IRRIGATION—RIGHTS OF SETTLERS—BENEFICIAL USE. The prior appropriators of the waters of a creek, who settled upon government land and later acquired title, and their successor in interest, are entitled to use all the waters which they had, within a reasonable time, devoted to a beneficial use in irrigating their lands.

SAME—PRESCRIPTIVE RIGHTS—QUANTITY OF WATER. A prescriptive right cannot be claimed to more than one-half of the waters of a creek, where the ditch through which it was diverted, as first constructed in 1896, did not carry more than one-half of the water, and was not enlarged until 1904, and the action was commenced in 1912 to enjoin the increased diversion.

SAME — APPROPRIATION — WRONGFUL DIVERSION — DAMAGES — EVIDENCE—SUFFICIENCY. In an action for the diversion of the waters of a creek, evidence of damages based on the assumption that the plaintiffs were entitled to all the waters, does not show the extent of the damages from a wrongful diversion of one-half of the waters.

¹Reported in 161 Pac. 360.

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Appeal from a judgment of the superior court for Stevens county, Sessions, J., entered March 15, 1915, in favor of the defendants, dismissing an action to determine conflicting claims to the waters of a stream. Reversed.

Murphy & Grant, for appellant.

Rochford & Wilson, for respondents.

MAIN, J.—The parties to this action are rival claimants to the waters of the north fork of Stranger creek, which is a small stream in Stevens county. The trial of the action resulted in a judgment of dismissal of the plaintiff's complaint. From such judgment, the appeal is prosecuted.

The facts are these: During the month of April, 1889, one Charles E. Potter settled upon a certain tract of land consisting of 160 acres, having purchased an Indian squatter's right thereto. In the course of time, Potter acquired this land under the Federal homestead act. At about the time Potter settled upon this tract of land, three other persons, Almira J. Burr, William R. Pierce, and L. W. Compton, also settled upon other 160-acre tracts in the immediate vicinity, and in time acquired title from the Federal government, as did Potter. Immediately after Potter settled upon his land, he began to divert the waters of the main channel of Stranger creek for domestic use and irrigation. This water was taken through what is known in the record as the Chinese ditch and the Indian ditch, the former having been constructed years before for the purpose of carrying water to a placer mining claim near the Columbia river. The Indian ditch was used by the Indian squatter for the purpose of carrying water to the land for irrigation purposes. After Potter settled upon the land, he improved these ditches, and continued, from year to year, to clear his land, and irrigate the same from the waters of Stranger creek, carried through the ditches mentioned. The other three parties above referred to also used water carried through the Chinese ditch for domestic and ir-

rigation purposes. In the year 1905, the appellant acquired Potter's land and that of the other three parties. After this land was acquired by the appellant, it put in a wooden pipe irrigation system, cleared and set much of the land to fruit trees, and sold it off in small tracts.

During the year 1887, the defendants in this action settled upon a tract of land upon the north fork of Stranger creek, and in time acquired the land from the United States government. In 1896, the defendants constructed a ditch, and began taking the water from the north fork of Stranger creek for the purpose of irrigating their land. In 1904, they enlarged this ditch, and after they began taking water through the enlarged ditch, they took about four-fifths of the water flowing in the north fork of Stranger creek during the dry or irrigation season. The appellant, not having sufficient water to irrigate its land when four-fifths of the water of the north fork of Stranger creek was being diverted by respondents, brought this action, claiming that it was entitled to all of the water of Stranger creek, including that flowing in the north fork, south fork, and middle fork. The appellant's point of intake, as was Potter's, was below the point on the stream where the water from the three forks had united and formed the main channel.

Without reviewing the evidence in detail, and after a most careful consideration of the same, we are of the opinion that Potter and the other three parties mentioned, who were the predecessors in interest of the appellant, acquired the right by appropriation to all the waters of Stranger creek, provided they had devoted the same to a beneficial use within a reasonable time. Up to 1905, when Potter sold to the appellant, all of the waters of Stranger creek were not needed for the purpose of irrigating the land then under cultivation. While it cannot be determined with mathematical accuracy the amount of water which had been appropriated and devoted to a beneficial use within a reasonable time, yet it seems fairly inferable from the evidence that the appellant's

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predecessors in interest, at the time it acquired title to the land and water rights, had devoted an amount of water to a beneficial use equal to all the waters flowing in the south and middle forks of Stranger creek, and one-half of that flowing in the north fork. It follows, therefore, that the trial court erred in not decreeing that the appellant was entitled to this quantity of water.

What the trial court's views may have been upon the evidence, there is nothing in the record to indicate. No findings of fact were made; no opinion of the trial judge appears in the record. The judgment was simply one of dismissal. The respondents had interposed the plea of the statute of limitation. The record being as it is, this is not a case where this court reverses the finding of a trial court upon conflicting oral testimony.

In any view of the case, the appellant was entitled to have adjudged to it one-fifth of the waters of the north fork of Stranger creek, because respondents were only claiming the right to four-fifths thereof. The respondents had not acquired by prescription a right to four-fifths of the water of the north fork of the creek. The ditch, as constructed in 1896, carried not to exceed one-half of the water. The present action was begun in 1912. No prescriptive right could be acquired, if that were relied upon, for a greater amount of water than was carried through the ditch as first constructed, and an equal amount which was a part of the flow in the enlarged ditch.

The appellant claimed damages in a considerable sum. The evidence in support of the damages was that of the president of the appellant company, and was based on the assumption that the appellant was entitled to all of the waters of the north fork of Stranger creek. It only being entitled to one-half of the waters, the evidence as to damages does not show the extent of the damages based upon this fact.

By way of repetition, it may be said that, taking into con-

sideration all the evidence in the case bearing upon the rights claimed by each party to the water, justice would seem to demand that each of the respective contenders be given one-half of the water of the north fork of Stranger creek.

The judgment will be reversed, and the cause remanded with instructions to the superior court to enter a judgment dividing equally between the parties the waters of the north fork of Stranger creek.

MORRIS, C. J., PARKER, and HOLCOMB, JJ., concur.

[No. 13547. Department One. December 6, 1916.]

A. B. HUGHES, *Respondent*, v. EASTERN RAILWAY & LUMBER COMPANY, *Appellant*.¹

FRAUDS, STATUTE OF—SALES—EXECUTED ORAL CONTRACT—EVIDENCE—SUFFICIENCY. Where parties negotiated for a written contract for the sale of logs and failed to make a formal writing, but entered upon performance and logs were cut and delivered and paid for at the price apparently agreed upon, the courts will treat the contract as an executed oral contract, and the jury is warranted in finding a binding contract to sell and to buy.

LOGS AND LOGGING—SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES—MITIGATION. Upon a breach of a contract to buy logs and a refusal to accept delivery, the seller's measure of damages is the difference between the contract price and the market value at the time and place agreed upon for delivery; hence it is admissible to show that the seller resold the balance of the logs upon more advantageous terms and so suffered no damages, the court taking into consideration such elements as the delay and expense incurred in the resale.

SAME—CONTRACT—BREACH OF CONTRACT—PROSPECTIVE PROFITS—MARKET—EVIDENCE. The rule allowing the seller his prospective profits in such a case applies only where there is no market, or the commodity is manufactured to meet a purpose leading away from, rather than into, a market; and a resale is competent evidence to prove a market.

CONTRACTS—ORAL CONTRACTS—BURDEN OF PROOF. In an action upon an executed oral contract for the sale of logs, there being no

¹Reported in 161 Pac. 343.

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written contract to overcome by clear and convincing evidence, it is sufficient to establish the oral agreement by a preponderance of the evidence.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 29, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Raymond J. McMillan, Ernest K. Murray, and C. D. Cunningham, for appellant.

Forney & Ponder and Wedmark & Grimm, for respondent.

CHADWICK, J. — There are two questions in this case: First, whether there was a contract between respondent and appellant for the sale of logs; and second, whether it was competent for the appellant to prove a sale of the rejected commodity to another in defense of an action to recover the profit that would have accrued to respondent in producing the logs; that is to say, the difference between the cost of production and the price appellant agreed to pay.

We find that, in the negotiations of the parties, it was their intention to reduce their contract to writing; that no less than three tentative contracts were drawn up, but none of them were signed in a formal way; that, nevertheless, respondent proceeded to cut and deliver logs, and appellant received and paid for them at a price which seemed to have been the price agreed upon between them. We understand the rule to be that, where the parties have negotiated for a written contract and have failed to make a formal writing, but have entered into the performance of the contract and have proceeded so far in its execution that the terms can be readily ascertained, a court will treat the contract as an executed oral contract, and measure the rights and obligations of the parties accordingly.

With this rule before us, we have no hesitation in subscribing to the verdict of the jury that the parties had entered

into a binding contract, and that the one party was bound to sell and the other was bound to buy.

Appellant contends that the measure of damages is the difference between the contract price and the market price at the time of the breach. Respondent, with equal zeal, insists that he is entitled to recover the difference between the cost of stumpage and logging and the price appellant agreed to pay for the logs, regardless of any after sale, or of the sum realized upon such sale.

The question came up primarily in this way. Appellant offered to show that, after it had declined to receive further shipments of logs, respondent had sold all of the timber remaining on the tract he was logging. It offered a contract of sale entered into by respondent and the Wabash Lumber & Shingle Company after the breach. The court rejected the proffered exhibit as irrelevant and immaterial. He did, however, allow it to be filed in evidence as affecting the original contract, though upon what theory we are not advised. Appellant then offered to show, by proof of a number of facts and conditions, that the contract with the Wabash company was more advantageous to respondent than was the original contract, and that respondent had, in fact, suffered no loss whatever by the default.

The general rule is that the measure of damages for the breach of a contract for the sale of a commodity, where the vendee refuses to accept delivery, is the difference between the contract price and the market value at the time and place agreed upon for delivery. *Bassetti v. Shenango Furnace Co.*, 122 Minn. 335, 142 N. W. 322; *Mitchell-Taylor Tie Co. v. Whitaker*, 158 Ky. 651, 166 S. W. 193; Benjamin, Sales (5th ed.), p. 806; Sedgwick, Damages (9th ed.), par. 753. See, also, *Moffat v. Davitt*, 200 Mass. 452, 86 N. E. 929; *Carle v. Nelson*, 145 Wis. 593, 130 N. W. 467; *Netter v. Trenton Whisk Broom Works*, 140 App. Div. 287, 125 N. Y. Supp. 141.

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This rule is declared in *Carver-Shadbolt Co. v. Klein*, 69 Wash. 586, 125 Pac. 944, where our only consideration was whether the facts brought the plaintiff within the rule. That case also recognizes the fundamental principle that, where there is a market, it is the duty of the aggrieved party to practice diligence to the end that the loss may be as "small as possible." And we think this is the rule governing in this case. The reasoning which sustains the rule is simple. It is that damages are allowed as compensation for actual monetary loss, and if the vendor can find a market equal or better than that provided in his contract, there is no loss to compensate.

We shall refer to but one or two of the decisions of this court which have been cited by counsel. As we read them, they are all in harmony with the general rule. The case of *Peterson v. Lone Lake Lum. Co.*, 58 Wash. 72, 107 Pac. 857, relied upon by both parties, is illustrative. There Peterson sold the timber on his land to the lumber company, agreeing to deliver it from time to time. After a part of the lumber had been delivered, the lumber company breached its contract. Peterson brought suit to recover his damages, which were measured by the difference between the cost of delivery and the price to be paid. Upon this state of facts, the court held to the rule of damages there stated; and there is much reason to sustain the rule, for it may be assumed, in the absence of a showing made by way of defense, that logs have no market value until cut and prepared for delivery in the market. But it does not follow that one who is sued for damages cannot avail himself of such defenses as the facts may warrant and the law allow. So in this case, the issue is tendered that the logs were resold on the market, and that respondent suffered no damages whatever. The logic of our cases seems to be that, where one who contracts to buy logs to be cut from standing timber breaches his contract, the vendor may recover the difference between the cost of pre-

paring the logs for delivery and the price agreed to be paid, subject, however, to the usual defenses that there is a market, or that the logs have been sold upon the market, and hence no damage has resulted, or would result if the plaintiff availed himself of the market.

We are reminded, however, that we are committed to the doctrine of allowing prospective profits. The case of *Bogart v. Pitchless Lumber Co.*, 72 Wash. 417, 130 Pac. 490, is relied on among others. Profits are allowed by way of compensation where there is no market price, or the commodity is manufactured to meet some purpose leading away from, rather than into, the market. The rule, or rather the exception to the rule, is resorted to *ex necessitate*, the object being, in either case, to make the unoffending contracting party whole upon his contract.

The case just referred to points the rule as well as its distinction. There a party had contracted to sell logs to another to be manufactured into lumber. He breached his contract. The vendee had nothing to sell upon the market to save or reduce his loss, and, of necessity, he was allowed a sum equal to the amount he would reasonably have made if the logs had been delivered. In other words, he was given the value of his contract. In the case at bar, respondent was not deprived of his goods by the breach of defendant. It follows that evidence of a market was competent and should have been received. A resale is competent evidence to prove a market. *Bigelow v. Legg*, 102 N. Y. 652, 6 N. E. 107; *Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, 91 Wis. 667, 65 N. W. 513; *Sedgwick, Damages* (9th ed.), p. 1577, par. 755.

The parties contend over a rule of evidence; the one, that the burden was on respondent to prove the oral contract upon which he relies by clear and convincing evidence; the other, that proof by a mere preponderance of evidence is sufficient. No written contract was entered into. If there is no written

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contract to be overcome by clear and convincing evidence, it is manifest that an oral agreement may be established by a preponderance of the evidence.

Respondent is entitled to recover damages, if any he has suffered, within the rule suggested. In fixing the measure, the court should take into consideration elements such as delay and expense necessarily incurred upon the resale.

Reversed, and remanded for a new trial.

MORRIS, C. J., MAIN, PARKER, and ELLIS, JJ., concur.

[No. 13614. Department One. December 6, 1916.]

VANCE LUMBER COMPANY, *Appellant*, v. UNITED STATES
TRUST COMPANY, *Respondent*.¹

PRINCIPAL AND AGENT—RELATION—BANK AS COLLECTING AGENT—EVIDENCE—SUFFICIENCY. A bank collecting and holding on deposit for a logger the proceeds of the sales of certain rafts of logs, is not shown to be an agent to collect or disburse all or any part of the proceeds for the benefit of the owner, under a stumpage contract whereby the logger agreed to pay \$2.85 per thousand for logs cut as soon as they were sold; where it appears that the logger made payment, either through the bank or directly, for the first rafts sold, that the bank was helping to finance the logging operations, advancing money to the logger, who at times overdrew the account, and that the bank, in making collections from the purchasing mills, was acting under the directions of the logger and making only such disbursements as directed by him; it further appearing that the logging operations took up the whole of the proceeds, leaving insufficient to pay the stumpage under the contract.

TRUSTS—IMPLIED TRUSTS—EXISTENCE—DEPOSIT IN BANK—KNOWLEDGE OF DEBT. A bank, collecting the proceeds of logs sold by a logger, under his direction, would not be a trustee to the extent of the stumpage due, by reason of knowledge that the stumpage was to be paid upon the sale of the logs, where the stumpage contract did not create any lien on the logs or any right to the first proceeds, but only the relation of debtor and creditor.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered February 29, 1916, upon

¹Reported in 161 Pac. 341.

findings in favor of the defendant, in an action for money received, tried to the court. Affirmed.

W. H. Abel, for appellant.

Hogan & Graham, for respondent.

CHADWICK, J.—Appellant, Vance Lumber Company, and one C. W. Jensen entered into a logging contract. It was therein agreed that appellant would sell all the merchantable timber upon a certain portion of sections 29 and 32, township 17 north, range 5 west; that Jensen would cut the timber and market the same at the mills upon Grays Harbor. The material parts of the contract follow:

"It is agreed by and between the Vance Lumber Company, a corporation, hereinafter called the party of the first part, and C. W. Jensen, hereinafter called the party of the second part, as follows:

"The party of the first part hereby agrees to sell to the party of the second part, and the second party agrees to buy from the said party of the first part, all of the merchantable timber of every kind, now situate upon [certain lands].

"In consideration whereof, the said second party agrees to pay to said first party the sum of \$2.85 per thousand feet for said timber; that he will cut and remove said timber from said land within one year from this date. The party of the second part agrees to commence logging operations upon said lands within thirty days from date hereof, and to fully complete the same within one year from date hereof, and to cause the logs cut from said land to be conveyed to the market and mills upon Grays Harbor and sold.

"Payment for said timber shall be made at the rate of \$2.85 per thousand, at the time said logs are sold as follows: The first party has an option of being paid in cash, less two per cent or to take what is known as ninety day mill paper, at face value for said logs."

Twelve rafts of logs were cut and delivered to purchasing mills between May 29, 1915, and September 17, 1915. The proceeds from the sale of the first four rafts were deposited by the purchasers to Jensen's credit in respondent bank.

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Under Jensen's instructions, cashier's checks to the extent of \$2.85 per thousand feet board measure were mailed to Jensen, and he, in turn, sent them to appellant in accordance with the terms of the contract. Payment for the fifth raft was made by the purchasing mill company direct to Jensen. The proceeds received from the sales of the sixth, seventh, eighth, ninth and tenth rafts were deposited with, and retained by, respondent. No remittance to cover the contracted stumpage on these rafts was made, either by the bank or Jensen. It is to recover this amount that the present action was brought. The case was tried to the court without a jury, and resulted in a judgment of dismissal for the defendant.

Appellant first contends that respondent was an agent of Jensen's for the purpose of paying the stumpage, and that it should be permitted to recover as for money had and received; second, that the contract operated as an equitable assignment of the proceeds of the sales to the extent of \$2.85 per thousand.

The record does not establish, in that degree of certainty that would warrant us in overturning the findings of the trial court, that there was an agency on the part of respondent either to collect or disburse all or any definite part of the proceeds of the sale of the several rafts for the account of Jensen or for the benefit of appellant. The testimony, when considered as a whole, warrants the conclusion, and no more, that respondent was acting under the direction of Jensen, and that it made such disbursements as it was from time to time directed by him to make. Some of the testimony given by Jensen would indicate that he expected respondent to pay the stumpage out of the proceeds, but this testimony, if otherwise sufficient, is greatly weakened by circumstances and by the conduct of Jensen, who collected and disbursed the proceeds of one or more rafts on his own account, and who must have known the state of his account with the bank. The testimony clearly shows that the bank was helping him to finance his enterprise even to the extent of allowing an

overdraft against rafts not yet made up or delivered.

There was no privity between appellant and the respondent. The obligation of the respondent to meet Jensen's contract with appellant must, if sustained at all, rest upon the grounds of an express direction on the part of Jensen to respondent to pay the stumpage first out of any funds coming into its hands. If we grant that there was such direction, we must grant that it was Jensen's lawful right to modify his instructions, either by act or direction. We have said that he collected and disbursed the proceeds of raft five without the aid of the bank. As for the remaining rafts, it cannot be said that there was any agency. Jensen says:

"Q. Did you have a subsequent arrangement with the bank as to these later rafts including raft 6 and subsequent rafts that as soon as these rafts were in tide water or it was certain that they were coming in, you could draw against them, against the prospective proceeds, in your checking account in the bank and that that money would be paid back? A. Yes, I did. We made those arrangements from time to time. Q. Now, what were those arrangements? A. Call Mr. Vandevort up and tell him it was necessary to draw against the account and tell him where the logs were. Perhaps they would be at the mill and the logs were not scaled yet or they were at the boom. Q. So you drew against the proceeds of the logs before the logs were at the market? A. I did sometimes. Q. Wasn't that the reason, Mr. Jensen, that there was no money left to pay stumpage because it had been drawn out? A. Yes, I expect that had a great deal to do with it. Q. Wasn't that the actual reason? A. Well, yes. . . . A. As I remember it, Mr. Vandevort told me at different times when I went down there just how I stood. Q. And that the stumpage was not paid? A. Yes. Q. And that you had overdrawn your account and there was not anything to pay it? A. Yes, sir. Q. You knew you were spending this money operating your camp. This money that should have gone to Vance, you spent it? A. Yes. Q. You came to my office Sunday of this week? A. Yes, sir. Q. And you met Mr. Vandevort there? A. Yes, sir. Q. And at that time didn't you say that the first charge against those logs at all times was to take care of the overdraft? A. Yes, sir,

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I said that. Q. And didn't you say also that every check you drew against that of any kind, except perhaps a little personal check, went to the operation of that logging camp, bills that had to be paid? A. Yes, sir. Q. Didn't you say also that if you had not had that fire? . . . Q. Didn't you say that if you had not had that fire you would have had money to pay Vance? A. I said that if it had not have been for the fire the logging operations up there would have been all right."

Counsel further contends that, inasmuch as Jensen had agreed to pay appellant \$2.85 per thousand stumpage "at the time said logs are sold," and respondent knew that he had so agreed, it is to be charged as a trustee and is liable as for a conversion of a trust fund. That a bank which diverts a trust fund to the payment of the personal debt of a depositor is liable to the true owner, is well settled by authority.

We find no element that would attach a trust to the specific fund. The contract does not, in any way, reserve an interest in the logs sold, or the fund to be realized therefrom. Appellant is not, as to third parties, either the legal or equitable owner of the fund. The relation of debtor and creditor exists between Jensen and appellant, and nothing more. No lien is reserved; nor does the contract even provide that appellant shall have the first proceeds from the sale of the rafts. If Jensen had used the proceeds—as he did part of them—to pay for the expenses of logging, it could not for a moment be asserted that the ones who had been paid were bound to account to appellant although it was shown that they knew the terms of the contract. Neither can an equitable title be asserted as against other creditors who furnished money to carry on the work, or contributed to Jensen's general credit and needs pending the performance of the contract. This feature of the case is disposed of by the reasoning of the court in *Hossack v. Graham*, 20 Wash. 184, 55 Pac. 36.

Affirmed.

MORRIS, C. J., MAIN, ELLIS, and PARKER, JJ., concur.

[No. 13105. *En Banc*. December 6, 1916.]

JAMES DUNLAP, *Trustee, Appellant*, v. SEATTLE NATIONAL BANK, *Respondent*.¹

JURY—RIGHT TO JURY TRIAL—LEGAL OR EQUITABLE ACTION. An action by a trustee in bankruptcy to recover moneys deposited by the insolvent bank in another bank pursuant to a fraudulent conspiracy, is of an equitable nature, and there is no right to a jury trial, where an accounting of continuous transactions was necessary.

SAME. Where two causes of action are stated, one legal and the other equitable, equity takes jurisdiction for all purposes and there is no right to trial by jury.

CONSPIRACY—FRAUD—EVIDENCE—SUFFICIENCY. A fraudulent conspiracy to permit overdrafts in order to enable an insolvent bank to keep open and receive deposits until the co-conspirator was paid or secured cannot be inferred from facts and circumstances lawful in themselves and consistent with an honest purpose; and in such case the evidence is insufficient to show a fraudulent conspiracy where knowledge of the insolvent condition of the bank was not proven and was denied by two witnesses, and there was no proof that the minds of the alleged conspirators were cooperating.

BANKRUPTCY—PREFERENCES—SET-OFF OF BANK DEPOSITS. In the absence of fraud or collusion between a bank and its bankrupt customer, the bank is not required to surrender to the trustee in bankruptcy deposits made by the bankrupt as a condition precedent to proving the balance of its claim, but has a right to appropriate the deposit to the payment of the indebtedness.

SAME. To constitute a preferential transfer and voidable preference, within the meaning of the bankruptcy act, there must be a parting with the bankrupt's property for the benefit of the creditor and a diminution of the bankrupt's estate, and the balance of an account current when the transactions cease is to be taken as determining whether there has been an advancement constituting a voidable preference; hence no preference is shown where, at the beginning of the four months' period prior to the filing of the petition, the bankrupt's estate had a credit balance with a bank, and during the period the bank, although it received deposits from time to time, had paid over to the estate a greater sum than it had received.

SAME—PREFERENCES—MORTGAGE TO SECURE ADVANCES—NOTICE OF INSOLVENCY. A note and mortgage given to a bank to secure past and future advances, upon which overdrafts were permitted, in the

¹Reported in 161 Pac. 364.

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absence of fraud or collusion, does not constitute a voidable preference within the meaning of the bankruptcy act, where the bank did not have reasonable cause to believe that the taking of the security would effect a preference, nor knowledge of facts which, if pursued, would have shown insolvency; mere suspicion is not sufficient, the burden being upon the trustee to show reasonable grounds of belief.

TRIAL—FINDINGS OF FACT—NECESSITY. Findings of fact are not essential in an equitable case.

APPEAL—OBJECTIONS—WAIVER. Reversible error cannot be predicated upon reopening a case for further testimony, where no objection was made below.

TRIAL—CONDUCT—REOPENING—DISCRETION. It is discretionary to reopen a case, during the progress of the argument, for the taking of further testimony.

BANKRUPTCY—PREFERENCES—KNOWLEDGE OF INSOLVENCY. Where a bankrupt bank closed on May 16, and on the previous day at about 4 o'clock in the afternoon, an officer of a creditor bank had notice of the insolvency, remittances received by the creditor through the mails on the morning of the 16th, constitute an avoidable preference, in the absence of evidence as to the time they were mailed.

Cross-appeals from a judgment of the superior court for King county, Dykeman, J., entered July 6, 1915, in favor of the defendant, in an action by a trustee in bankruptcy to recover damages for fraud, and for an accounting, tried to the court. Affirmed. ✓

J. L. Corrigan, E. C. Million, and Thomas Smith, for appellant.

Oldham & Goodale, for respondent.

MAIN, J.—This action was instituted by the trustee in bankruptcy of the estate of W. E. Schricker and L. L. Andrews, copartners doing business as W. E. Schricker & Company, and W. E. Schricker and L. L. Andrews, individually. In the amended complaint, two causes of action are stated.

In the first, it is charged that W. E. Schricker and the officers of the defendant, the Seattle National Bank, entered into a fraudulent scheme and conspiracy whereby it was ✓

agreed between the parties thereto that the defendant bank would advance a sufficient amount of cash to enable Schricker to keep the Schricker & Company bank open for the reception of deposits, and that these deposits, when received, should be transferred to the Seattle National Bank for the purpose of paying the indebtedness owing to that bank by the Schricker bank. It is further alleged that, in pursuance of this scheme or conspiracy, more than \$200,000 was received by Schricker, and in turn transferred to the Seattle National Bank.

In the second cause of action, it is alleged that, during the four months preceding the date when the petition in bankruptcy for the Schricker bank was filed, the Seattle National Bank received deposits from the Schricker bank in excess of \$100,000, and a note and mortgage for the sum of \$9,000. It is claimed that these remittances and the mortgage were voidable preferences under the Federal bankruptcy act. Upon the first cause of action, a judgment is prayed for in the sum of \$142,961.85, and upon the second cause of action, \$127,038.15.

After the issues were framed, over the objection of the plaintiff, the cause was tried to the court without a jury, and resulted in a judgment denying any recovery upon the first cause of action, and awarding judgment against the defendant in the sum of \$3,485, this being the amount of certain checks collected by the defendant on the day that the Schricker bank ceased to do business, and after the Seattle National Bank had knowledge that it had closed its doors. From this judgment, both parties appeal.

The record is long, and the briefs are exceedingly large. The facts are complicated and, in an opinion of reasonable length, they cannot be stated in great detail. The facts which will give an understanding of the questions to be determined may be stated as follows: During the year 1889, W. E. Schricker and L. L. Andrews formed a copartnership for the purpose of conducting a private bank at LaConner, Wash-

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ington, under the name of W. E. Schricker & Company. Soon after this bank began to do business, the Puget Sound National Bank, located at Seattle, Washington, became its correspondent in that city. The Schricker bank was located in one of the richest agricultural communities of the state. Its customers were largely substantial and well to do farmers and some small merchants. During the year 1898, the Schricker bank became involved with one R. P. Thomas, who, at the time, was operating a sawmill at or near Anacortes, Washington, which will hereafter be referred to as owned by the Fidalgo Mill Company. The relation between the bank and the mill company continued, and the indebtedness from the mill company to the bank increased from time to time. In April, 1909, the mill company was owing the Schricker bank upon notes approximately \$159,000, and an equal or greater amount by way of an overdraft. On April 29, 1909, Schricker applied to the Puget Sound National Bank for permission to overdraw his account with that bank, stating that he did not think he would need to exceed \$15,000. This permission was granted.

On May 16, 1910, the Puget Sound National Bank and the Seattle National Bank were consolidated under the name of the latter, and the Seattle National Bank became the correspondent of the Schricker bank, as the Puget Sound National Bank had theretofore been. At this time there was an overdraft in favor of the Schricker bank in the sum of approximately \$55,000. On November 22, 1910, this overdraft had reached the sum of \$102,000, and on this day a letter was written by the vice president of the Seattle National Bank to the Schricker bank, stating that, in advancing funds, that bank preferred that it be arranged in another manner "instead of carrying it as an overdraft." On December 3, 1910, the overdraft having reached the sum of \$106,298.59, five notes were given to cover this amount, four for \$20,000 each and one for \$26,298.59. No security at this

time was requested or taken to secure the notes, though Schricker had previously offered certain securities.

After these notes were given, Schricker continued his overdrafts with the Seattle National Bank. Much correspondence took place between the parties, the officers of the Seattle bank objecting to the overdraft and urging Schricker to renew certain of his paper and send it to them for rediscount. On May 22, 1911, the indebtedness of the Schricker bank to the Seattle bank upon the notes and upon the overdraft was \$143,000. The amount which the Seattle National Bank was permitted to loan to any one customer was \$120,000. At this time, the national bank examiner appeared for the purpose of examining the Seattle National Bank. Some time during the month of May, Schricker sent to the Seattle National Bank two notes secured by mortgages for \$10,000 each. These notes were transferred to one John Davis, or John Davis & Company, and a deposit made showing the reduction of the Schricker account to the extent of the amount of the notes and mortgages. In addition to this, one of the officers of the Seattle National Bank advanced \$3,000 which, taken in connection with the mortgages, reduced the Schricker indebtedness to the legal limit of \$120,000. On May 29, 1911, Schricker and his wife came to Seattle, and while there met two of the officers of the Seattle National Bank and executed a deed to an interest in certain coal lands in the state of Pennsylvania, which the Schrickers owned, for the purpose of securing the indebtedness of the Schricker bank to the Seattle National Bank.

The overdraft of the Schricker bank continued until about the middle of June, 1911, when the account shows that that bank had a credit balance with the Seattle National Bank. From this time until the middle of August there were times when the account showed an overdraft, and other times when it showed a credit balance. After the middle of August, 1911, the credit balance increased until, on the 2d day of November, 1911, the Schricker bank had a credit balance with the Seattle

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National of approximately \$97,000, and was owing upon the notes \$106,000. Early in November, Schricker paid the \$26,000 note by a check against his credit balance, and at about the same time took back the two notes and mortgages for \$10,000 each, and had his account charged with that sum. After November 2, 1911, when Schricker's credit balance had reached its highest point, it gradually declined until February 17, 1912, when again the overdraft appears.

From this time until the 15th day of May the overdraft was continuous. Correspondence took place between the two banks, the Seattle National urging that the overdraft be taken care of, and Schricker, in turn, promising that he would send down notes for rediscount, and thus cover it. On April 15, 1912, the overdraft continuing and the notes not having been sent for rediscount which would cover it, Schricker requested a further overdraft. After this request was received, one of the officers of the Seattle National Bank went to LaConner and saw Schricker in the latter's bank. This officer of the Seattle National had \$1,000 in currency with him for the purpose of delivering the same to Schricker when the latter should turn over the notes for rediscount. The meeting occurred in the Schricker bank. The officer of the Seattle National requested that he be permitted to see Schricker's note case, and the latter thereupon got it and placed it upon the table with the remark that the matter was all over, or something to that effect. The officer of the Seattle National opened the note case and learned for the first time that the \$159,000 of one-name paper held by the Schricker bank was Fidalgo Mill Company notes, some of which had then been outlawed. The Seattle National Bank declined to make any further advances, and on the day following, Schricker's bank closed.

All loans and advances by the Schricker bank to the Fidalgo Mill Company were made prior to the time when the Seattle National Bank became the correspondent of that bank. The money advanced by the Seattle National was used

by the Schricker bank to meet the demands of its depositors. The petition in bankruptcy was filed on May 22, 1912.

This is but a skeleton of the facts as they appear in the record. Further reference will be made to the facts in connection with the points to which they may be particularly pertinent.

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The first question is whether the plaintiff was entitled to a jury trial. The second cause of action may be conceded to be legal in its nature. The first cause of action, if the plaintiff should prevail, would necessarily involve an accounting. If a conspiracy existed Schricker was a party thereto, and nothing could be recovered on his account. The amount of the recovery arising from the fraudulent scheme or conspiracy as alleged would be the costs and expenses of the litigation and what the depositors of the Schricker bank had lost by reason of such fraudulent scheme or conspiracy. The transactions between the two banks were continuous and almost daily, and were of the same general character as exists between two correspondent banks. The amount of the deposits made by the Schricker bank in the Seattle National would not be the correct measure of recovery. For instance, if a customer with the Schricker bank should deposit \$10,000 therein on one day in the form of a check drawn upon some other bank, and Schricker should send this check to the Seattle National Bank for collection and deposit in that bank, and a few days later the customer of the Schricker bank should draw out his \$10,000 from the Schricker bank, and Schricker should in turn withdraw the same amount from the Seattle bank, obviously this deposit should not be included in the amount of recovery.

To determine the amount of recovery, if any were to be had, an accounting would be necessary, and consequently it is a subject of which equity takes jurisdiction. 1 Pomeroy, Equity Jurisprudence (8d ed.), § 140. It is a familiar rule that "when a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and

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proceed to a final determination of all the matters at issue." 1 Pomeroy, Equity Jurisprudence (3d ed.), § 181.

It follows, therefore, that where two causes of action are stated in the complaint, one of which is legal and the other equitable, equity takes jurisdiction for all purposes and proceeds to a final determination of all matters at issue. *Cogswell v. New York, N. H. & H. R. Co.*, 105 N. Y. 319, 11 N. E. 518; *McKinley v. Britton*, 55 Ind. App. 21, 103 N. E. 349. There are other reasons urged why plaintiff was not entitled to a jury trial in this case, which it is not necessary here to review. The trial court did not err in denying a jury trial.

Upon the merits, the first question is whether the officers of the Seattle National Bank and Schricker entered into a fraudulent scheme or conspiracy as alleged in the first cause of action. If the officers of the Seattle bank did not know that the \$159,000 of one-name paper in the Schricker bank was that of the Fidalgo Mill Company, and did not know that the overdraft to that mill company was far in excess of its value, there is nothing upon which to base the charge that appears in the complaint. Schricker did not testify upon the trial. Two officers of the Seattle National Bank had died subsequent to the failure of the Schricker bank, and prior to the trial of this action. The two officers of the Seattle bank who testified both denied positively that they, at any time, knew or suspected that the Schricker bank was insolvent until the afternoon of April 15, 1912, when Schricker's note case was examined for the first time. They testified that they did not know the \$159,000 in notes was Fidalgo Mill paper, but believed it was largely the notes of well to do farmers and a few small merchants. They also testified that, while they knew from and after the 29th day of May, 1911, there was an overdraft to the Fidalgo Mill Company in the sum of \$189,000, they had been assured by Schricker that this overdraft was secured upon the mill, and that the mill property was worth \$250,000. The truthfulness of the testimony of

these two witnesses is vigorously assailed by the plaintiff, but apparently it was not disbelieved by the trial court, and the record furnishes no reason to regard their testimony other than truthful.

The plaintiff, in support of his charge, does not rely upon positive testimony, but upon circumstances, claiming that these establish the charge as made. Fraud cannot be inferred from facts and circumstances lawful in themselves and consistent with an honest purpose. If, when all the facts and circumstances are taken together, they are consistent with an honest intent, proof of fraud is wanting.

In *Foster v. McAlester*, 114 Fed. 145, the circuit court for the eighth circuit, said:

"Fraud cannot be inferred either by the court or jury from acts legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud. They must not be, when taken together and aggregated—when interlinked and put in proper relation to each other,—consistent with an honest intent. If they are, the proof of fraud is wanting."

It is true that the officers of the Seattle National Bank knew, for some time prior to May 15, 1912, that, unless they advanced money to the Schricker bank from time to time, it would be necessary for that bank to close; and it is also true, as stated in one of the letters, that the condition of the Schricker bank had been a matter of concern to the Seattle bank. If the Schricker bank's \$159,000 of notes was good paper, as was represented by Schricker, and the overdraft to the Fidalgo Mill Company was secured by a mortgage on property worth \$250,000, the bank would not be insolvent, even though it did not have cash sufficient for its daily needs. If the assets were sufficient to meet the obligations within a reasonable time, the bank was not insolvent. *State v. Cadwell*, 79 Iowa 432, 44 N. W. 700. Over the correctness of this

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rule as to insolvency, there seems to be no controversy in the briefs, and further discussion of it is unnecessary.

In order that there be a conspiracy, it would be necessary that the record show that the minds of Schricker and the officers of the Seattle National Bank cooperated. A careful reading of the entire record in this case leads to the conclusion that the minds of these men were not cooperating, but that Schricker was deceiving the Seattle National Bank as to the real condition of his bank. There are two circumstances which indicate very strongly that the officers of the Seattle National Bank did not know of the insolvency of the Schricker bank prior to the afternoon of April 15, 1912. One of these is the disposition of the two notes and mortgages for \$10,000 each which Schricker had sent down in May, 1911, and taken back in November of the same year. When these mortgages were paid by the charges upon his account at his request for the amount thereof, the Seattle National Bank inquired of him what disposition he desired made of the mortgages, and was directed to return them to him. At this time, Schricker still owed the Seattle National Bank upon the notes which were secured alone by a deed to the interest in the Pennsylvania coal lands, which was represented by Schricker, at the time the deed was given, to be worth from \$75,000 to \$100,000. Had the officers of the Seattle National Bank at this time believed that Schricker's bank was insolvent, certainly they would have retained these mortgages as additional security.

The other circumstance is that when Schricker's deposits had reached the sum of \$97,000, he was then owing his five notes aggregating the sum of \$106,000. Had the officers of the Seattle National Bank then believed him to be insolvent and refused to extend him further credit, they would have had the legal right, in the absence of fraud or collusion, to have had this \$97,000 applied upon the notes. This proposition is strongly controverted by the plaintiff, but in the light

of the holdings of the Federal supreme court, which will be here referred to, the question is not a debatable one.

In *New York County Bank v. Massey*, 192 U. S. 138, it was held that, even though the bank knew at the time certain deposits were made by its customer that his liabilities greatly exceeded his assets, the bank, under the Federal bankruptcy act, was not required to surrender to the trustee in bankruptcy the deposits as a condition precedent to proving the balance of its claim, but it had the right to appropriate the deposit to the payment of the indebtedness of the customer of the bank. It was there said:

"As we have seen, a deposit of money to one's credit in a bank does not operate to diminish the estate of the depositor, for when he parts with the money he creates at the same time, on the part of the bank, an obligation to pay the amount of the deposit as soon as the depositor may see fit to draw a check against it. It is not a transfer of property as a payment, pledge, mortgage, gift or security. It is true that it creates a debt, which, if the creditor may set it off under section 68, amounts to permitting a creditor of that class to obtain more from the bankrupt's estate than creditors who are not in the same situation, and do not hold any debts of the bankrupt subject to set-off. But this does not, in our opinion, operate to enlarge the scope of the statute defining preferences so as to prevent set-off in cases coming within the terms of section 68a. If this argument were to prevail, it would in cases of insolvency defeat the right of set-off recognized and enforced in the law, as every creditor of the bankrupt holding a claim against the estate subject to reduction to the full amount of a debt due the bankrupt receives a preference in the fact that to the extent of the set-off he is paid in full."

Further in the same opinion, it is stated:

"It is true, as we have seen, that in a sense the bank is permitted to obtain a greater percentage of its claim against the bankrupt than other creditors of the same class, but this indirect result is not brought about by the transfer of property within the meaning of the law. There is nothing in the findings to show fraud or collusion between the bankrupt and

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the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

In *Studley v. Boyleston Nat. Bank*, 229 U. S. 523, under facts similar to those in the *Massey* case, and following that case, it was held that the bank itself had the right to make the appropriation and prove its claim for the balance. It was there stated:

"If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the trustee. But there is nothing in § 68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted."

In *Germania Sav. Bank & Trust Co. v. Loeb*, 188 Fed. 285-288, the circuit court of appeals for the sixth circuit stated the doctrine of the *Massey* case as follows:

"It has been authoritatively decided by the Supreme Court, in considering these two sections, that the balance of a regular bank account at the time of filing the petition is a debt due to the bankrupt from the bank, and in the absence of fraud or collusion between the bank and the bankrupt, with the view of creating a preferential transfer, the bank need not surrender such balance, but may set it off against the notes of the bankrupt held by it, and may prove its claim for the amount remaining due on the notes."

The trial court properly denied a recovery upon the first cause of action.

Upon the second cause of action, recovery is sought for the amount of deposits which were made in the Seattle bank by the Schricker bank within the four months previous to the filing of the petition in bankruptcy, and also for the note and mortgage in the sum of \$9,000 which was sent by the Schricker bank to the Seattle National Bank some time during

the month of February, 1912. Considering first the claim for the money which it alleged the Seattle National Bank received, it appears that, during this period of time, the account between the two banks was a mutual running account. Where the account between the bankrupt's estate and the person or corporation charged with having received a preference is an account current, the balance of the account, when the transactions cease, is to be taken in determining whether there has been an advancement by the bankrupt's estate which would constitute a voidable preference. If the bankrupt's estate has not been diminished by reason of the transactions, there is no voidable preference. *Morey Mercantile Co. v. Schiffer*, 114 Fed. 447; *In re Dickson*, 111 Fed. 726, 55 L. R. A. 349; *Jaquith v. Alden*, 189 U. S. 78.

In the last case cited, speaking upon this question, it was said:

"The account was a running account, and the effect of the payments was to keep it alive by the extension of new credits, with the net result of a gain to the estate of \$546.89, and a loss to the seller of that amount less such dividends as the estate might pay."

To constitute a preferential transfer within the meaning of the bankruptcy act there must be, first, a parting with the bankrupt's property for the benefit of the creditor, and second, diminution of the bankrupt's estate. In *Continental & Commercial Trust Co. v. Chicago Title & Trust Co.*, 229 U. S. 435, it was said:

"This case must be dealt with in the light of certain principles, established by decisions of this court, in determining the applicable provisions of the bankruptcy act. To constitute a preferential transfer within the meaning of the bankruptcy act there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate."

Applying the doctrine of these cases to the facts in the present case, it appears that, at the beginning of the four months' period, the bankrupt's estate had a credit balance

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with the Seattle National Bank, and at the time the bank was closed it had an overdraft. During this period of time, the Seattle National Bank, while it had received deposits from the bankrupt's estate from time to time, had paid over to the estate or for the estate's benefit a greater sum of money than it had received. Taking the balance of the account, there was nothing upon which to predicate an action for voidable preferences.

As to the \$9,000 note secured by a mortgage, it must be dealt with in two aspects. The evidence shows that the mortgage was given to secure both antecedent indebtedness and subsequent advancements. Considering first the question relative to the subsequent advancements, the rule of the Federal courts is that a security transferred for future advances, in the absence of fraud or collusion, does not constitute a voidable preference. *Tomlinson v. Bank of Lexington*, 145 Fed. 824; *Van Iderstine v. National Discount Co.*, 227 U. S. 575. The doctrine of these two cases may be stated by quoting a paragraph from the syllabus of the *Tomlinson* case as follows:

"Where a bank allowed a customer to overdraw on the express agreement that the customer should assign good accounts for collection to pay the overdraft the subsequent assignment of the accounts, although the customer was insolvent, did not constitute the giving of a preference."

The note and mortgage being for \$9,000, and the overdraft at the conclusion of the account being for a less sum, or \$7,161.11, the question arises whether the difference between the amount of the note and the amount of the overdraft would constitute a voidable preference when applied as security for the antecedent debt. The bankruptcy act does not prohibit the taking of such security, but makes it a voidable preference if the creditor, at the time it is received, has reasonable cause to believe that the transfer of the security "would effect a preference." Federal bankruptcy act, par. 60. The burden is on the trustee to show that the creditor

had reasonable ground to believe that the transfer of the security would effect a preference. *United States v. Reardon & Sons*, 191 Fed. 454; *In re Hull*, 224 Fed. 796.

Mere suspicion is not sufficient to charge the creditor with knowledge or reasonable cause to believe that the transfer of the security will effect a preference, but there must be evidence of facts sufficient to put a reasonably prudent person upon inquiry which, if pursued, would show insolvency, and that a preference would be the result of the taking of the security or the receiving of payments. In *Nichols v. Elken*, 225 Fed. 689, the circuit court of appeals for the eighth circuit used this language:

"Mere suspicion, of course, is not sufficient to charge the defendants with knowledge of, or reasonable cause to believe, Tilden's insolvency at the time of these payments; but there must be evidence of facts sufficient to put a reasonably prudent person upon inquiry, which, if pursued, would show that Tilden was insolvent and that a preference would be the result of making these payments."

The remarks of the Federal supreme court in *Grant v. National Bank*, 97 U. S. 80, are pertinent here. It was said:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very

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eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose.

"The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided.

"Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man. .

"It is on this distinction that the present case turns. It cannot be denied that the officers of the bank had become distrustful of Miller's ability to bring his affairs to a successful termination; and yet it is equally apparent, independent of their sworn statements on the subject, that they supposed there was a possibility of his doing so. After obtaining the security in question, they still allowed him to check upon them for considerable amounts in advance of his deposits. They were alarmed; but they were not without hope. They felt it necessary to exact security for what he owed them; but they still granted him temporary accommodations. Had they actually supposed him to be insolvent, would they have done this?"

The evidence in the present case does not show that the officers of the Seattle National Bank had reasonable cause to believe that the taking of the security would effect a preference. Neither does the evidence show that they had knowl-

edge of facts which, if pursued, would have shown the insolvency at the time.

Another contention is that the judgment should be reversed because no findings of fact and conclusions of law were entered by the trial court. This contention, apparently, is based on the assumption that the action was legal and not equitable. As we have already seen, the cause was one of which a court of equity had jurisdiction. No findings, therefore, were necessary.

The final contention on the part of the plaintiff is that the trial court erred, after the evidence had closed and during the progress of the argument, in directing that one of the witnesses take the witness stand and testify upon matters relative to which he had not been interrogated by either side when previously testifying. During the argument, the court inquired of counsel for the defendant why he had not interrogated this witness relative to certain matters, specifying them. Thereupon a colloquy took place between the court and counsel for defendant, which resulted in the witness being called to the stand and his testimony taken. There are two reasons why this was not reversible error. First, the record does not show the interposition of any objection to the testimony, and second, it was not an abuse of discretion reposed in the trial court.

Upon the appeal of the defendant, little need be said. On May 16, 1912, the day the Schricker bank closed, the Seattle National Bank received certain remittances through the mail. On the previous day, at approximately four o'clock in the afternoon, the officer of the Seattle National Bank who had gone to LaConner ascertained that the Schricker bank was insolvent. These remittances were received after knowledge of insolvency, and with knowledge that they would effect a preference. For a reversal of this portion of the judgment, the defendant relies upon the case of *McDonald v. Chemical Nat. Bank*, 174 U. S. 610. In that case, the remittances were made several days before suspension by a bank in Ne-

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braska to the Chemical National Bank in New York, and were received after suspension. But the evidence in this case does not bring it within the rule of that case. There is here no evidence as to when the remittances were mailed. The only evidence is that they were received on the morning of the 16th. So far as the record shows, they may have been mailed subsequent to the time when the Seattle National Bank had actual notice of the insolvency.

The judgment will be affirmed.

MORRIS, C. J., MOUNT, HOLCOMB, PARKER, FULLERTON, ELLIS, and CHADWICK, JJ., concur.

[No. 13117. Department One. December 8, 1916.]

MICHAEL BOGITCH, *Respondent*, v. POTLATCH LUMBER
COMPANY, *Appellant*.¹

MASTER AND SERVANT—INJURY TO SERVANT—WHAT LAW GOVERNS. Where an accident occurred in Idaho, the rule of the supreme court of that state that the failure of a hook tender in charge of a logging crew to give warning of the "go ahead" signal, was the act of a fellow servant and not a vice principal, for which the master would not be liable if he had employed competent fellow servants, is binding upon the courts of this state, when pleaded.

STIPULATIONS—EVIDENCE—FOREIGN LAWS. In an action for personal injuries from an accident in another state, a stipulation that both sides should waive "any testimony and agreeing that the court may consider" the laws of such state in evidence, makes the statutes and decisions of that state evidence, and does not make conclusive an erroneous legal conclusion of the trial court, which is subject, upon proper exceptions, to correction on appeal.

TRIAL—EVIDENCE—FOREIGN LAWS—PROVINCE OF COURT AND JURY. When a rule of law in a sister state merely involves the interpretation of judicial opinions, it becomes a question of law for the court and not of fact for the jury.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered May 19, 1915, upon the

¹Reported in 161 Pac. 487.

verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by one employed as a swamper in a logging crew. Reversed.

Cannon & Ferris, for appellant.

Corkery & Corkery and *Robertson & Miller*, for respondent.

CHADWICK, J.—This is an action to recover for injuries which respondent alleges he sustained while in the employ of the Potlatch Lumber Company, in the state of Idaho, in November, 1914. Appellant, at that time, was cutting and hauling timber to a point of loading, by means of a donkey engine and cable. The evidence is somewhat conflicting, but the methods of operation would seem to have been about as follows: The sawyer gang would fell the tree; swampers would trim the branches; the slinger rigger would attach the cable to the tree; the hooktender, who was in charge of all the operations, would call out a warning to the swampers and all the others, and then signal a man called the whistlepunk who was stationed some three hundred feet away; the whistlepunk would pull a wire which extended to the donkey engine, and which would signal the engineer to go ahead or stop, etc. The donkey engine was located about a thousand feet from where the timber was being secured. Respondent alleges that he was working as a swamper, and was trimming a tree when, without warning, the tree was put in motion by means of the cable; that he was thrown under the tree and sustained injury. Respondent recovered in the court below.

A number of assignments of error going to the sufficiency of the evidence and to the instructions of the court have been made by appellant. The proximate cause of the injury, as found by the jury, was the failure of the hooktender to warn respondent that he was about to give the "go ahead" signal to the whistlepunk. Appellant pleaded:

"That if plaintiff was in any manner injured at the time and place set forth in plaintiff's complaint, the said injuries occurred in the state of Idaho, and that under the common

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law of the state of Idaho, as construed by the courts of said state, plaintiff's injury, if caused by and through the negligence of anyone other than himself, was caused and brought about by and through fellow servants of the plaintiff, and that under the common law of the state of Idaho, as construed by its courts, the defendant is in no way responsible for the negligence, if any, of said fellow servants, and that the negligence of said fellow servants of the plaintiff is, under the decisions of the courts of the state of Idaho, construing the common law, one of the risks which the plaintiff assumes, and which plaintiff did assume as a matter of law."

The accident occurred in the state of Idaho, and the law of that state being pleaded, is, when ascertained, controlling. At the time the case was tried, the case of *Lucey v. Stack-Gibbs Lumber Co.*, 23 Idaho 628, 131 Pac. 897, 46 L. R. A. (N. S.) 86, was the last expression of the supreme court of that state. That case seemed to hold to the rule that pertains in this state; that is, that the duty of the master who is engaged in hazardous work, where the safety of the workmen depends upon a system or code of warning signals to warn the workmen, is a nondelegable duty, and that the foreman or the one upon whom the duty of giving the signal or warning is put is a vice principal and not a fellow servant. This rule is peculiar to the state of Washington. The great majority of the states, if not all of them, as well as the supreme court of the United States, has held in such cases that the master has performed his full duty when he has adopted a sufficient system or code of signals, and put it into the hands of competent men for execution. 4 Labatt, Master & Servant (2d ed.), § 1537.

We find that the supreme court of the state of Idaho has recently rejected the doctrine of the case mentioned, and has put itself in line with the great weight of American authority, although, as we have said, it is contrary to the rule that pertains in this state. That court held in *Wiesner v. Bonners Ferry Lumber Co.* (Idaho), 160 Pac. 647, that that part of the opinion in the *Lucey* case upon which respondent relied,

and which no doubt moved the court below to sustain the judgment that was entered, was *obiter*.

"And so far as it may be considered as supporting the doctrine that 'authority to a servant to give a signal [to a co-servant] is nondelegable,' it is expressly overruled.

"The theory of respondent is that, by reason of the fact that the warning was not given upon the occasion of the accident, the appellant is liable in damages, irrespective of the fact that it exercised ordinary care, having regard to the hazard of the service, in providing a reasonably safe place and reasonably safe appliance for the performance of the work, in the selection of a competent servant to perform the duty of giving the warning, and had adopted a proper system of rules and regulations with positive instructions that every precaution be taken in order to avoid accident; in short, if the servant failed to give the warning, the appellant company under no circumstances could escape liability.

"This, we think, is carrying the rule a step too far. The enforcement of such a principle, in view of the rapid development of this state and the great number of men employed, would be detrimental to the employe as well as the employer. There must be some reasonable limitation placed upon both the employer and the employe, in the matter of fixing the liability of the former for negligence and the assumption of risk by the latter."

The court then proceeds to cite and elaborate upon many decisions, concluding as follows:

"By the great weight of authority, the master may entrust to a competent servant the work of giving signals where it is necessary for the safety of the workmen in the operation of the work, and it is not the master's fault if such competent servant fails to give the proper signal. Nor is respondent's contention that the master is an insurer of the sufficiency of the means which he selects for giving signals supported by the preponderance of authority."

Counsel for respondent contend that we cannot consider the more recent decision of the Idaho court because the law of Idaho was a fact to be proven, and counsel has waived his right to assert that the law is otherwise than as declared by the trial judge, having stipulated that the court might make

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up his own instruction as to the law of Idaho without formal proof. We have reread that part of the record which is relied on by counsel as a stipulation. We think counsel went no further than to stipulate that the court could instruct as it conceived the law to be under the decisions of the supreme court of Idaho, counsel contending meanwhile that the fellow servant rule in Idaho was not the same as in this state.

The agreement was that both sides should waive "any testimony, and agreeing that the court may consider the laws of Idaho in evidence." The laws of Idaho, that is, the statutes and decisions, are to be proven as facts. The legal conclusion or the construction of the written or declared law becomes the law of the case. It follows, then, if the law of a foreign state is to be ascertained by a reference to its statutes, and the practice and adjudged cases, the decisions of its courts are no more than evidence of the law. If a trial judge draws a wrong legal conclusion from the written evidences of the law, this court may, upon proper exceptions, correct the error, as it would any other error of law. In doing so, it is in duty bound to follow the courts of the foreign state.

There is nothing to indicate that counsel stipulated to be bound by the conclusion of the trial judge as expressed in his instructions. On the contrary, counsel excepted to all of the instructions, charging the hooktender as a vice principal, arguing then, as we must presume, and in their brief on appeal, that the hooktender was a fellow servant under the authority of *Knauf v. Dover Lumber Co.*, 20 Idaho 773, 120 Pac. 157.

The courts of Idaho have an undoubted right to construe their own decisions, and having said in the *Wiesner* case that the *Lucey* case did not hold to the rule relied on, or if seemingly so, that it was *obiter*, we have no recourse other than to follow the rule as it is, and as the supreme court of Idaho says it was, at the time this case was tried.

Counsel maintain that this case is to be distinguished upon the facts. We find no ground of distinction. The place where

respondent was working was not unsafe if the warning had been given. Under the law of Idaho, the fault or omission was that of a fellow servant.

There being no issue raised as to the sufficiency of the signal system, or the competency of the hooktender to give the signals or the ability of the respondent to understand a warning if given, and this case being controlled by the law of the state of Idaho as expounded by its court of last resort, the judgment will be reversed and the case remanded with instructions to dismiss.

In justice to the trial judge, it is only fair to say that, if this case were to be decided under our own decisions, or under the law of Idaho as we would have read the *Lucey* case, we would hold the case for affirmance upon this question of law. We have not inquired into the other assignments of error.

MORRIS, C. J., ELLIS, and MOUNT, JJ., concur.

PER CURIAM.—This case was heard at the January, 1916, term. As stated in the opinion, the trial judge rested his opinion as to the law of Idaho upon the case of *Lucey v. Stack-Gibbs Lumber Co.*, 23 Idaho 628, 131 Pac. 897, 46 L. R. A. (N. S.) 86. We noted a later decision of the supreme court of Idaho, *Wiesner v. Bonners Ferry Lumber Co.*, since reported in 160 Pac. 647, in which it was held, in the opinion of the judges of the supreme court of Idaho, that such construction was not well founded, and that in so far as the *Lucey* case might be considered as supporting the doctrine that authority to a servant to give a signal is non-delegable, it was expressly overruled. Subsequent to the writing of the foregoing opinion and about the time it would otherwise have been filed, counsel for respondent called our attention to the fact that a rehearing had been granted in the *Wiesner* case. Accordingly we withheld the filing of our opinion pending a ruling upon the petition for rehearing. The supreme court of Idaho, upon such rehearing, has adhered to its original holding.

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Counsel for respondent has filed a supplemental brief again urging that respondent had pleaded the law of Idaho as a fact, and that, by stipulation, the trial judge had given it to the jury as a matter of fact and not of law, and that the ruling of the trial judge thus became a fact conclusive even though he did err, or even though the supreme court of Idaho did subsequently change its decision. Counsel cite the case of *Spies v. National City Bank*, 174 N. Y. 222, 66 N. E. 786, 61 L. R. A. 193, and *Genet v. President etc. of Delaware & H. Canal Co.*, 163 N. Y. 173, 57 N. E. 297. But these cases merely hold, quoting from the *Spies* case: "What may be the foreign law upon a given subject presents a question of fact, not a question of law . . . and must be both proved and found like any other question of fact." While there is some conflict as to this being the true rule, for the purpose of this case it may be admitted to have the sanction of the greater number of courts; but there is a well recognized exception, upon which practically all courts that have considered it, seem to agree. This exception is well stated in 10 R. C. L., pp. 1112-1113, as follows:

"There is some controversy whether the proof of foreign laws should be addressed to the court or the jury. It involves, however, no serious conflict, and depends entirely upon the form in which the foreign law is presented. Although what the foreign law is, is usually denominated a question of fact, yet, when it merely involves the construction of a written statute or the interpretation of judicial opinions, it becomes a question of law."

Bank of China, Japan & The Straits v. Morse, 168 N. Y. 458, 61 N. E. 774, 85 Am. St. 676, 56 L. R. A. 139 and *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207, 70 Am. St. 232, 42 L. R. A. 396, also recognize this exception. See, also, *Ely v. James*, 123 Mass. 36; *Kline v. Baker*, 99 Mass. 253; *Thomson-Houston Elec. Co. v. Palmer*, 52 Minn. 174, 53 N. W. 1137, 38 Am. St. 536, and *Lockwood v. Crawford*, 18 Conn. 360. In *Hite v. Keene*, 149 Wis. 207,

134 N. W. 383, 135 N. W. 354, Ann. Cas. 1913D 251, it was held that, on appeal, the court will not accept the testimony of what the law of a sister state is where it is contrary to its own conclusions from statutes in evidence and reported cases.

But regardless of what may be the rule in other jurisdictions, this court, in *Ongaro v. Twohy*, 57 Wash. 668, 107 Pac. 834, has held that where the law of a sister state is involved and is based upon the decisions of that state, the question of what the law is, is for the court, and not the jury. It was there said:

"The appellant further argues that the court erred in determining for itself, from the proofs offered in evidence, what the law of Idaho was at the time the injury in question occurred, but contending that the question should have been submitted to the jury. The authorities seem not to be in harmony on this question, but we are clear that in any view there was no error committed here. There was no disputed questions of fact to be determined; on the contrary, there was no dispute in the evidence at all. The sole question was what were the proper legal inferences to be drawn from the facts proven, and this clearly was for the court."

This court having held that what the law of a sister state is is a question of law when proven by undisputed facts, surely, then, what the foreign law is is also a question of law when proven by a decision of the foreign state court. It being a question of law, it is, therefore, for this court to say whether the lower court erred in construing the decision of the Idaho supreme court.

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Opinion Per PARKER, J.

[No. 13240. *En Banc*. December 9, 1916.]

THE STATE OF WASHINGTON, *on the Relation of*
Andrew Peterson, Respondent, v. THE CITY
OF SEATTLE, *Appellant*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—DECISION OF CITY ENGINEER—ARBITRARINESS. A provision in a city contract making the decision of the city engineer final and conclusive as to the amount of work to be paid for under the contract, is not binding where it appears that it was so manifestly erroneous as to be arbitrary and capricious, and will be disregarded by the courts.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 6, 1915, upon findings in favor of the plaintiff, in an action in mandamus by a contractor to obtain special assessment warrants or bonds. Affirmed.

James E. Bradford, Hugh M. Caldwell, and Howard A. Hanson, for appellant.

John W. Roberts and George L. Spirk, for respondent.

PARKER, J.—This action, while in form a mandamus proceeding, is in substance an action to recover a balance claimed by the relator Peterson to be due him upon his contract with the city of Seattle for the construction of a local street improvement. Trial in the superior court without a jury resulted in findings and judgment in favor of the relator in the sum of \$2,041.93, and mandamus against the officers of the city requiring them, in satisfaction of the judgment, to issue and deliver to the relator warrants or bonds payable by special assessment against the local improvement district. From this disposition of the case, the city has appealed to this court.

By the terms of the contract, Peterson was, upon completion of the improvement, to be paid therefor in local improve-

¹Reported in 161 Pac. 478.

ment warrants or bonds, in a total sum determinable by the quantities of the various items of construction and the unit price therefor agreed upon; for instance, earth work, twenty-eight cents per cubic yard; clearing and grubbing, \$100 per acre; wood walks, \$20 per thousand feet, board measure, etc. The controversy here is over the quantities of earth work and three or four other small items for which Peterson claims compensation under the contract, claiming that the city engineer arbitrarily and capriciously refused to allow, in his estimate of quantities, the full amount of work actually performed in the construction of the improvement. So far as the merits of Peterson's claims are concerned, they present only questions of fact, and counsel for the city contend that the decision of the city engineer on these questions of fact in the making of his estimates became final and conclusive upon Peterson because of the following provision of the contract:

"To prevent all disputes and litigation, it is further agreed by the contractor that the city engineer shall in all cases determine the amount of work to be paid for under the contract for this improvement, and his estimates and decisions shall be final and conclusive, subject to the approval of the board of public works."

This contention, of course, would have to be sustained unless it can be said from the evidence that the decision of the city engineer was so manifestly wrong as to call for the conclusion that it was arbitrary and capricious on his part, to the prejudice of Peterson, which evidently is the theory upon which the trial court rendered its decision in favor of Peterson. We have read all the evidence with care, as presented in the abstracts prepared by counsel, and conclude therefrom that we cannot see our way clear to disturb the conclusion reached by the trial court, notwithstanding the provision of the contract in terms making the engineer's decision in determining the several quantities of the different classes of work final. The conclusion that the engineer's determination of the quantities was so manifestly erroneous as to evidence

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Syllabus.

arbitrary and capricious action on his part we think finds support in the evidence, and that the trial judge did not err in so regarding it. The evidence is very lengthy and involves many details which we think it unnecessary to review here. That a decision of a supervising architect or engineer, arbitrarily or capriciously made to the prejudice of a contractor, though such architect or engineer be made an arbiter by the terms of the construction contract, will be disregarded by the courts, is well settled. *Taft v. Whitney Co.*, 85 Wash. 389, 148 Pac. 48.

The judgment is affirmed.

MOUNT, MAIN, CHADWICK, HOLCOMB, ELLIS, and FULLERTON, JJ., concur.

[No. 13452. *En Banc*. December 9, 1916.]

HARRY C. HEERMANS, *Appellant*, v. F. G. BLAKESLEE,
Respondent.¹

CHATTEL MORTGAGES—ASSIGNMENTS TO SECURE DEBT—NECESSITY OF AFFIDAVIT OF GOOD FAITH AND RECORDING. A chattel mortgage is created by assignments of the "present and future earnings and income" of a water works company, "as security for payments and advances" made or to be made by the assignee, where the assignee's rights thereunder are referred to as "liens hereby created," making the same security for a debt which is to continue to exist until paid, with interest; and hence the same are inferior to the lien of subsequent writs of garnishment, and void as to creditors, unless accompanied by an affidavit of good faith and recorded as required by Rem. & Bal. Code, § 3660.

CHATTEL MORTGAGES—PROPERTY SUBJECT—CHOSE IN ACTION—STATUTES. The earnings and income of a public service water company are subject to chattel mortgage, under Rem. & Bal. Code, § 3659, providing that mortgages may be made "upon all kinds of personal property and upon . . ." rolling stock, all kinds of machinery and upon boats and vessels, . . . and such like property, and growing crops, etc.; since the general words are not limited by the subsequent enumeration of particular things some of which are not included in the general terms.

¹Reported in 161 Pac. 489.

NOTE: Rehearing *En Banc* granted and pending.—REP.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered March 13, 1916, dismissing an action for an accounting, upon sustaining a demurrer to the complaint. Affirmed.

Frank C. Owings and Thos. L. O'Leary, for appellant.

Chas. D. King, for respondent.

PARKER, J.—The plaintiff, Harry C. Heermans, seeks an accounting from the defendant, F. G. Blakeslee, for moneys received by him through writs of garnishment issued upon a judgment rendered in his favor against the Washington Public Service Company, and also seeks to have the defendant enjoined from causing to be issued additional writs of garnishment against the debtors of that company. The moneys so acquired and sought to be acquired by the defendant are claimed by the plaintiff as assignee of that company. The defendant demurred to the plaintiff's complaint upon the ground that it does not state facts constituting a cause of action. The demurrer being sustained by the superior court and the plaintiff electing to stand upon his complaint and not plead further, judgment of dismissal was rendered against him, from which he has appealed to this court.

The controlling facts appearing in appellant's complaint may be summarized as follows: The Washington Public Service Company is a water works corporation, engaged in furnishing water to the city of Olympia and its inhabitants. On the 28th day of December, 1914, appellant became a creditor of the Washington Public Service Company on account of money advanced by him to pay certain of its accruing indebtedness. On that day, a writing was signed by the Washington Public Service Company and appellant, which writing is claimed by him to be one of the assignments entitling him to the moneys acquired and sought to be acquired by respondent through writs of garnishment. This writing, following recitals therein of the advancements made

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by appellant, reads, so far as we need here notice its provisions, as follows:

"Now Therefore, in consideration of the premises the debtor [Washington Public Service Company] hereby agrees to pay to the creditor [appellant], in the manner hereinafter set forth, all sums heretofore advanced by the creditor, as hereinbefore recited, . . . with interest on all such sums advanced at the rate of eight per cent per year. . . .

"As security for such payments and advances the debtor hereby assigns to the creditor all such present and future earnings and income from sales of water and from service performed as a water company in Olympia, Washington, as shall become due and payable from consumers to it on or after January 1, 1915, . . .

"The creditor hereby constitutes the debtor his agent to collect for him and receipt for in the name of the debtor, all earnings and income hereby assigned, and agrees that if on each day on which any such collections are made—until the debtor's obligation hereunder is fully paid—the debtor shall pay one-half of the income and earnings collected on that day to the creditor at the Capital National Bank in Olympia—and deposits made therein by the debtor to the credit of the creditor shall conclusively be deemed payment to the creditor of all sums so deposited, and the receipt of said bank shall be conclusive evidence of each such deposit—and if the debtor shall perform and observe those agreements on its part hereinafter contained the debtor may retain the remaining one-half of each such days collections for its own use, freed from all liens hereby created and freed from all liability to account to the creditor therefor as his agent.

"And further in consideration of the premises the debtor agrees with the creditor that the remaining half of its collections reserved to the debtor by any of the provisions of this agreement shall be by it promptly applied to the expense of operating and maintaining its water plant in Olympia (with such minor additional service connections and other additions as may be necessary to keep the plant in proper condition for service), including in such expense of operation and maintenance a monthly salary list not exceeding \$515, and that no other manner of expenditures shall be made therefrom except with the written consent of the creditor."

On the 30th day of January, 1915, another writing of substantially the same import was signed by the Washington Public Service Company and appellant to secure repayment to him of additional sums then about to be advanced by him for the benefit of that company. Neither of these writings was accompanied by an affidavit of good faith, acknowledged or recorded as required by Rem. & Bal. Code, § 3660, relating to the execution of chattel mortgages.

Thereafter the Washington Public Service Company became indebted to respondent for goods, wares, and merchandise by him sold to it, and thereafter respondent was awarded a judgment by the superior court of Thurston county against the Washington Public Service Company for the goods, wares, and merchandise so sold, in the sum of \$1,300.29. In that action respondent caused to be issued sundry writs of garnishment against persons indebted to the Washington Public Service Company, being its customers as water consumers, resulting in some of such persons paying into court the sums owing by them to the company, which were thereafter paid to respondent; and in others, answering acknowledging their indebtedness to the company. Respondent threatens to cause to be issued additional writs of garnishment against customers of the company. Appellant alleges that the writs of garnishment already caused to be issued by respondent "are impairing plaintiff's contracts of assignment heretofore set forth and constitute an irreparable damage to plaintiff and are impairing his security," and that respondent's causing the issuance of additional writs of garnishment will further impair his security. Upon these facts, respondent prays for an accounting and injunction as we have already stated.

In view of the fact that these writings signed by the Washington Public Service Company and appellant, which are claimed by appellant to be assignments effectually transferring the title to "present and future earnings and income" of that company, do not purport to assign the proceeds of

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any specified existing contract or contracts of that company, nor any specified amount due or to become due from any present or prospective debtor of the Washington Public Service Company, it may well be doubted that the thing so attempted to be assigned has sufficient potential existence to become the subject of assignment. See 5 C. J. 866, 871, and authorities there cited.

We leave that question undecided, however, since, as we view these writings, they are in no event anything more than attempted executions of chattel mortgages creating liens upon the "earnings and income" of the Washington Public Service Company, which, if properly executed and timely recorded, we assume for present purposes might create such liens, as against the rights of respondent. The particular provisions and recitals of these writings leading us to conclude that they could in no event be more efficacious than chattel mortgages, are the relation therein recited of appellant to the Washington Public Service Company as creditor, which relation manifestly is, by the terms of the writings, contemplated as continuing until the debts attempted to be so secured are paid with interest; the recital therein that the debtor assigns its "earnings and income" to appellant "as security for such payments and advances"; and the reference therein to the rights of appellant as "liens hereby created." Plainly this is an assignment as security for the payment of a debt, which debt is to continue to exist until paid with interest.

We have noticed that neither of these writings is accompanied by an affidavit of good faith, acknowledged or recorded as required by Rem. & Bal. Code, § 3660, which reads:

"A mortgage of personal property is void as against creditors of the mortgagor or subsequent purchaser, and encumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyance of real property."

In the meantime, the liens of respondent's writs of garnishment have attached to the moneys and credits of the Washington Public Service Company claimed by appellant, and we see no reason why the right of respondent to acquire additional liens by additional writs of garnishment should not continue as long as these writings remain unaccompanied by affidavits of good faith, unacknowledged and unrecorded, as required by § 3660, above quoted. That a valid lien of a creditor, whether acquired by judicial process or otherwise, is superior to a chattel mortgage executed by his debtor unaccompanied by an affidavit of good faith, unacknowledged and unrecorded, is thoroughly settled by the decisions of this court. *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. 966; *Smith v. Allen*, 78 Wash. 135, 138 Pac. 683, Ann. Cas. 1915D 300; *Spokane Merchants' Ass'n v. First Nat. Bank of Colville*, 86 Wash. 367, 150 Pac. 434.

We assume that the rights of appellant and respondent, merely as creditors of the Washington Public Service Company, are equal. The question here is who acquired the first valid lien upon the funds, not merely as against the public service company, but as between appellant and respondent. Respondent having acquired such liens upon moneys due from the debtors of the public service company, by writs of garnishment, and having the right to acquire additional liens upon moneys due from the debtors of that company, by writs of garnishment, so far as the present rights of appellant are concerned, we conclude that the learned trial court did not err in sustaining respondent's demurrer and rendering judgment of dismissal in his favor upon the election of appellant to not plead further.

Counsel for appellant, in support of their contention that the assignments made to him by the public service company of its earnings and income are not chattel mortgages, within the meaning of Rem. & Bal. Code, § 3660, above quoted, cite the recent decision of the supreme court of Kansas in *Hall*

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v. Kansas City Terra Cotta Co., 97 Kan. 103, 154 Pac. 210, L. R. A. 1916D 361. That decision, when read without reference to the difference between the Kansas statute and our own, does seem to be at variance with the conclusions we here reach; but we think it is not so when that difference is taken into consideration. The Kansas statute is silent upon the question of what kind of personal property may be mortgaged, while ours in Rem. & Bal. Code, § 3659, reads:

“Mortgages may be made upon all kinds of personal property, and upon the rolling stock of a railroad company and upon all kinds of machinery, and upon boats and vessels, and upon portable mills, and such like property, and upon growing crops and upon crops before the seed thereof shall have been sown or planted. . . .”

It can hardly be seriously contended that the earnings and income of the public service company assigned to appellant as security are not personal property as described by the words “all kinds of personal property” found in § 3659 above quoted. It may be suggested, however, that these words are to be read in the light of the particular enumeration of different kinds of property which follow them; but we think the enumeration of such kinds of property does not limit the meaning of the words “all kinds of personal property,” but expand rather than limit the meaning of those words. This is not a case of general words in a statute following the enumeration of particular classes of persons or things, but the opposite of that, and where at least some of the enumerated things would not be included in the general words, “all kinds of personal property” but for the particular enumeration. This at least seems to be true as to the enumeration of “growing crops.” We think the rule of *ejusdem generis* does not call for our holding that the words, “all kinds of personal property,” as used in this statute, are limited by the particular enumeration of the kinds of property following those words in the statute, to similar property to that particularly enumerated. 36 Cyc. 1119-1122.

Now the Kansas statute touching the recording of chattel mortgages (§ 5224, General Statutes of Kansas, 1909), in force when the assignment involved in *Hall v. Kansas City Terra Cotta Co.* was made, reads:

"Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated,
.

thus evidencing a legislative intent to have the recording requirement of the statute refer only to the mortgaging of physical personal property capable of manual delivery, while our statute expressly authorizes the making of mortgages upon "all kinds of personal property" and declares all such mortgages void as against creditors, etc., unless accompanied by the affidavit of good faith, acknowledged, and recorded. Whether or not a chose in action such as is here involved may be mortgaged or pledged is ordinarily a different question from the question of whether or not such mortgaging or pledging falls within the recording statute; though, under our statute, "all kinds of personal property" may be mortgaged and all such mortgages must be accompanied by the affidavit of good faith, acknowledged, and recorded or be held void as to creditors, etc. Those decisions holding that it is only mortgages of physical personal property capable of manual delivery which fall within the recording statute, by reason of the particular provisions of the recording statute involved in the given case, also recognize the law to be that a chose in action, though not capable of manual delivery because of the fact that it is not physical personal property, can become the subject of chattel mortgage or pledge for the security of a debt. Among numerous decisions so holding,

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we note the following: *Lawrence v. McKensie*, 88 Iowa 432, 55 N. W. 505; *Dunn v. Michigan Club*, 115 Mich. 409, 73 N. W. 386; *Livermore Falls Trust & Banking Co. v. Richmond Mfg. Co.*, 108 Me. 206, 79 Atl. 844.

We conclude that the decision of the supreme court of Kansas above noticed is not controlling here, in view of the provisions of our statute.

The judgment is affirmed.

MOUNT, MAIN, HOLCOMB, and ELLIS, JJ., concur.

[No. 13256. Department One. December 12, 1916.]

ROSA ELSOM, *Appellant*, v. ELLA GADD, *Respondent*.¹

EXEMPTIONS—LIFE INSURANCE—PROCEEDS—EXEMPTION FROM DEBTS—STATUTES. Construed together as *in part materia* with Rem. 1915 Code, § 569, Rem. & Bal. Code, § 6158, providing that, if a policy of insurance is effected by any person on his own life, the lawful beneficiary thereof, other than himself or his legal representatives, shall, unless contrary to the terms of the policy, be entitled to its proceeds against the creditors, was intended to modify the sweeping provisions of § 569, providing that the proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt; hence, to claim the exemption, the insurance must be payable to some beneficiary "other than the assured or his legal representatives" (FULLERTON, J., dissenting).

SAME—STATUTES—REPEAL—SUBJECT-MATTER. The repealing clause of the Insurance Code, Laws 1911, p. 298, § 238, repealing all prior acts "on the subject of the organization and government of insurance companies and insurance business," was not intended to repeal the earlier act, Rem. 1915 Code, § 569, exempting the proceeds or avails of all life and accident insurance from liability for any debt; the subject-matter of exemptions being a distinct subject-matter in and of itself not necessarily included within an act relating to insurance.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 14, 1915, in favor of creditors of an estate, upon a hearing upon objections to the

¹Reported in 161 Pac. 483; 162 Pac. 867.

final account and distribution by the administrator. Affirmed.

Tucker & Hyland, for appellant.

Charles H. Miller, for respondent

CHADWICK, J.—This appeal raises the question whether a life insurance policy payable to the estate of a deceased person is exempt from the payment of the debts of the estate. At the time the case was decided in the court below, the case of *German-American State Bank of Ritzville v. Godman*, 83 Wash. 231, 145 Pac. 221, was the final expression of this court. The trial judge, however, found that the statute under which appellant claims, Rem. 1915 Code, § 569, was an exemption statute and could not be invoked in aid of one who did not come within the usual definitions of exempt persons, following the principles set forth in 18 Cyc. at pp. 1374, 1397, and 1436.

An appeal was taken. Pending a hearing, we announced our decision in the case of *In re Blattner's Estate*, 89 Wash. 412, 154 Pac. 796. A rehearing was granted in the latter case. The final decision of the court, sitting *En Banc*, was rested upon the doctrine of preferred claim, a majority of the judges saying:

"This view of the record renders it unnecessary to consider the question determined in our former opinion, and we leave it open to future consideration." *In re Blattner's Estate*, 92 Wash. 48, 158 Pac. 1015.

While the opinion of the court might be rested upon the grounds indicated by the trial judge, we shall not—because of the importance of the main issue, and the fact that it must inevitably recur unless finally determined—inquire into the soundness of the holding that the statute is not available to one who is not named as a privileged person in the general exemption laws.

We have had the benefit of two able oral arguments in the *Blattner* case, with exhaustive briefs, and a more exhaustive

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petition for a rehearing. We have also had the benefit of able argument and briefs in this case, and conclude that the decision in the *Blattner* case, 89 Wash. 412, 154 Pac. 796, is the true interpretation of the law and controls the case at bar.

It was explained in the *Blattner* case that the issue now determined was not called directly to the attention of the court in the case of *Northwestern Mut. Life Ins. Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326, and in the case of *German-American State Bank of Ritzville v. Godman*, *supra*, but counsel insist that the issue was in fact involved, and that, under those decisions, money payable to an estate is exempt from all debts of the estate. Granting, but without holding, this to be so, a majority of the judges are now content to subscribe to the first opinion in the *Blattner* case, and, that no confusion may follow, it will be understood that the cases last referred to, in so far as they affect the main issue, are now overruled.

Affirmed.

MORRIS, C. J., MOUNT, and ELLIS, JJ., concur.

FULLERTON, J. (dissenting).—An examination of the opinion in the case of *In re Blattner's Estate*, 89 Wash. 412, 154 Pac. 796, will show that the decision was rested entirely on a particular clause of § 36 of the act of March 17, 1909 (Laws 1909, p. 556, § 36; Rem. & Bal. Code, § 6158). Our attention was not then directed to the later act on the subject of life insurance, found in the Laws of 1911, p. 161 (Rem. 1915 Code, § 6059-1 *et seq.*). In the argument on the rehearing of the cause, however, this statute was brought to our attention, and it was strenuously contended that it repealed the statute of 1909, leaving the general statute (Rem. 1915 Code, § 569), which exempts the proceeds or avails of all life and accident insurance from all liability for any debt, in full force with respect to life insurance payable to the estate of a decedent. This ques-

tion is not noticed in the majority opinion, although it seems to me to be worthy of consideration.

The act of 1911 purports to be a complete insurance code. It is entitled:

"An Act to provide an Insurance Code for the State of Washington, to regulate the organization and government of insurance companies and insurance business, to provide penalties for the violation of the provisions of this act, to provide for an Insurance Commissioner and defining his duties, and to repeal all existing laws in relation thereto." Laws 1911, p. 161.

The last section of the act contains a repealing clause. It reads:

."This act may be referred to and shall be known as 'The Insurance Code,' and shall supersede all prior acts on the subject of the organization and government of insurance companies and insurance business, and all such prior acts are hereby repealed." Laws 1911, p. 298, § 238 (Rem. 1915 Code, § 6059-238).

The language of this section, it is true, is somewhat restrictive, but I think it broad enough in its terms to include the particular clause on which the case of *In re Blattner's Estate* was rested. It expressly repeals all prior acts on the subject of insurance business, and this particular clause, to my mind, clearly relates to insurance business. If it does not, it has no standing under any circumstances or on any theory, since it was enacted under the title, "An act to regulate the business of life insurance, . . ." a title too restrictive to permit the enactment of any provision not relating to such business.

But if it be said that this particular section does not relate to insurance business, was properly enacted, and that the repealing clause in the later act is so far restrictive as to refer to nothing that would not have been superseded by the act itself had it contained no repealing clause, I think the same result must follow. The new law covers the whole subject-matter of the old one, and if any part of the latter

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remains, it is only the particular provision now under consideration. In the early case of *Mansfield v. First Nat. Bank*, 5 Wash. 665, 32 Pac. 789, 999, we held that, where a new law covers the whole subject-matter of an old one, the earlier law is repealed by the later one, notwithstanding there may be some matters in the earlier law which are not necessarily obnoxious to any provision of the new one. The rule rests not strictly on the ground of repeal by implication, but upon the principle that, where the legislature makes a revision of a particular statute and frames a new statute on the subject-matter, it is a legislative declaration that whatever is embraced in the new law shall constitute the existing law and that whatever is excluded therefrom is discarded. The principle of the case cited has been followed in numerous other cases decided by us, the latest of which is perhaps the case of *Whitfield v. Davies*, 78 Wash. 256, 138 Pac. 883.

The principle is controlling here. I am convinced, therefore, that the cases of *Northwestern Mut. Life Ins. Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326, and *German-American State Bank of Ritzville v. Godman*, 83 Wash. 231, 145 Pac. 221, were correctly decided, and that we were in error in the case of *In re Blattner's Estate*, and that the majority are in error in the opinion in the case before us.

ON REHEARING.

[Decided January 30, 1917.]

PER CURIAM.—A petition for rehearing has been filed in this case. The principal reliance of counsel, and the only one which calls for further argument, is that § 36 of the act of 1909, p. 556, Rem. & Bal. Code, § 6158, upon which *In re Blattner's Estate*, 89 Wash. 412, 154 Pac. 796, is made to rest, was repealed by the act of 1911 [Laws 1911, p. 161; Rem. 1915 Code, § 6059-1 *et seq.*], which purports to be a revision and rewriting of the insurance code; that if we

grant the soundness of the court's holding that the former act, Laws 1895, p. 336 (Rem. & Bal. Code, § 569), exempting the proceeds and avails of all life insurance, was modified by § 36 of the act of 1909, we should at this time, our attention being called to the act of 1911, adhere to our former holding, that is to say, the rule of *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. 851, and *German-American State Bank of Ritzville v. Godman*, 83 Wash. 231, 145 Pac. 221. No better statement of the position of counsel can be made than is made by Judge Fullerton in his dissenting opinion in the instant case.

Whether the act of 1911 repeals § 36 of the act of 1909 is a question involving some perplexity and, as we believe, one that should not, and cannot be, determined by reference to the two acts of 1909 and 1911 alone, without a harvest of consequences that would destroy all of the law pertaining to the exemption of the proceeds and avails of life insurance, whether the rule is found in the statutes or the opinions of this court.

The first act exempting the proceeds and avails of life insurance was passed in 1895. It is entitled: "An act exempting the proceeds of life insurance from liability for debt, and declaring an emergency." It is provided:

"Be it enacted by the Legislature of the State of Washington:

"Section 1. That the proceeds or avails of all life insurance shall be exempt from all liability for any debt." Laws 1895, p. 336.

This act was amended, Laws 1897, p. 70. The amendment is not material to our discussion. It was carried into the codes under the title "Homesteads and Exemptions," Bal. Code, § 5252; Rem. & Bal. Code, § 569; Rem. 1915 Code, § 569. It found its way to this court for the first time in *In re Heilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602, and was there treated as a remedial statute partaking of the nature of "but not strictly" an exemption

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law, the controlling question being whether the named beneficiary had a property interest in the policy and whether the act of 1895 was retroactive.

In *Flood v. Libby*, *supra*, the right of holders of endowment policies as against their creditors was considered. No question of "insurance business" is suggested in the opinion. The present worth of the policies was held to be exempt, the court saying:

"It is within the power of the legislature to declare what property shall be exempt, and we think the language of the statute is too plain to call for controversy."

In 1909, the legislature passed what is known as the insurance code, Laws 1909, ch. 142, p. 538. While there is no repealing clause, it was intended and accepted as a complete code containing all the law intended for the regulation of the business of *life insurance*. It is entitled:

"An Act to regulate the business of life insurance, the issuing of policies of endowment or of annuity, and the organization and operations of companies formed to transact such business."

The act of 1909 contained the following provision:

"If a policy of insurance is effected by any person on his own life, or on another life in favor of a person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself, or his legal representatives, shall, unless contrary to the terms of the policy, be entitled to its proceeds against the creditors and representatives of the person effecting the same; and the person to whom a policy of life insurance is made payable may maintain an action thereon in his own name."

Then came *Northwestern Mut. Life Ins. Co. v. Chehalis County Bank*, 65 Wash. 374, 118 Pac. 326, wherein the act was treated as an exemption statute. We shall presently make further reference to this case. The act was so treated in *Reiff v. Armour & Co.*, 79 Wash. 48, 139 Pac. 633, L. R. A. 1915A 1201. In *German-American State Bank of*

Ritzville v. Godman, *supra*, it was held that the "policies came to the widow . . . as an exempt fund." The right of any insurance company to the fund involved was in no sense an issue in any of these cases. The controversy in all cases was between third parties.

In 1911, the legislature rewrote the insurance code, providing regulatory measures for all forms of insurance, the title of the act being:

"An Act to provide an Insurance Code for the State of Washington, to regulate the organization and government of insurance companies and insurance business, to provide penalties for the violation of the provisions of this act, to provide for an Insurance Commissioner and define his duties, and to repeal all existing laws in relation thereto." Laws 1911, p. 161.

It contained a repealing clause:

"This act may be referred to and shall be known as 'The Insurance Code' and shall supersede all prior acts on the subject of the organization and government of insurance companies and insurance business, and all such prior acts are hereby repealed." Laws 1911, p. 298, § 238.

We had theretofore held in the *Northwestern Mut. Life Ins. Co.* case that the act of 1895 had not been repealed by § 36 of the act of 1909, that the enactments were not inconsistent and were to be construed *in pari materia*. This holding was adhered to in the *Blattner* case. In other words, we held the exemption statute of 1895 had been modified by § 36 of the act of 1909 to the extent that, if a policy were made payable to a named beneficiary, the proceeds and avails were exempt to the named beneficiary, but if made payable to the estate, they would not be exempt. Section 36 is plain in its terms. It contains no words inviting construction. We acknowledged its force in the several cases where it is referred to. We treated it as a provision pertaining to the "business of life insurance."

Having in mind the title of the act of 1909 (Laws 1909, p. 538): "An act to regulate the business of life insur-

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ance" and "the organization and operations of companies formed to transact such business," the question occurred whether § 36 was repealed by the act of 1911. To engage the subject offhand, accepting the act of 1911 as one intended to cover the whole subject-matter of the old law, and, as we think, without due consideration of the several acts, their titles and subject-matter, and of certain accepted rules of statutory construction, it may be contended with some show of reason that § 36 of the act of 1909 is repealed. That it is not so, seems evident to us. First, the object of the act of 1911 is evidenced by its title and confirmed by a reading of the body of the act. It is to include within the range of the insurance code the regulation of all forms of insurance: Life, health, accident, fire and marine, bonding, casualty, surety, title and fraternal. The repealing clause should not be held to affect any law that does not fall certainly within the definition of insurance business. It may be admitted that the payment of a policy, or the right to sue upon a policy is, in a sense, insurance business. It is not strictly so. It is a mere detail affecting the rights of a claimed beneficiary on the one hand and a creditor on the other. Those engaged in insurance business have no interest in the policy when matured by death or casualty, or in the affairs of creditors of the beneficiary of the estate.

Section 36 of the act of 1909, as well as the act of 1895, goes beyond the limit of "insurance business," as the term is bounded by ordinary definition. As so frequently suggested in our opinions, these acts relate to, and are intended to preserve, certain exemptions; to protect the proceeds of insurance policies to certain persons from the levy of certain other persons. It is most likely that the true intent of the legislature was not to repeal any part of the life insurance act of 1909 unless clearly repugnant to or inconsistent with that part of the act which was rewritten in 1911, but rather to repeal all "prior acts" upon the subject of the added topics which we have enumerated.

The two acts, § 36 and the act of 1895, are so tied together that one cannot be held to be repealed unless we hold that the other is repealed. Such repeal can only be held upon the assumption that the exemption of the proceeds and avails of an insurance policy is "insurance business." We are thus driven to the extremity of sustaining both or wiping the books clean of all statutes exempting insurance moneys. We are sustained in our conclusion that, although the exemption of the proceeds of insurance was "insurance business" to such collateral extent that a provision to that effect would be treated *in pari materia* with a prior act, that phase of the question is not in any way treated, either directly or by suggestion, in the act of 1911.

We were face to face with the same assault upon the statute of 1895 that was made in the case of *Northwestern Mut. Life Ins. Co. v. Chehalis County Bank*, *supra*, where we held that the "insurance" law would be construed with reference to existing statutes, saying:

"The question with us is not what might be held to be within the title if it were the only law upon the statute books, but whether an existing law is repealed by the terms or implications of the later law."

It will thus be seen, if we deny the two enactments—the act of 1895 and § 36—the force of "exemption" statutes, and treat them as incident to "insurance business" only, both would have to fall under the repealing clause of the act of 1911, for the one is just as much "insurance business" as the other.

It is said that § 36 is within the subject-matter of the act of 1911. Exemptions to debtors is a subject-matter in and of itself. It is in no way related to the insurance business, nor should it be included in the subject-matter of insurance. Although in drafting laws it is not an unusual thing for the legislature to touch upon more or less remotely allied subjects, where it does so and afterwards revises the whole act

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without touching the allied subject, the courts will not eliminate the related subject unless the legislative intent is fairly deducible from the act itself.

In the instant case, the legislature did not indicate in the act of 1911, by any affirmative expression, that it intended to revise the law with reference to the exemption of insurance moneys. The argument to sustain the theory of repeal must be found in the repealing clause and that alone. How can it be said that an act intended only to "supersede all prior acts on the subject of the *organization and government* of insurance companies and *insurance business*" has to do with the exemption of insurance moneys in suits between third parties. It neither has to do with the organization and government of insurance companies, nor is it even remotely connected with the "organization and government of . . . insurance business."

Even under the theory of "complete revision" of the subject-matter of insurance, the position of counsel cannot be any stronger than it would be had the legislature said, in terms: All acts and parts of acts inconsistent with this act are hereby repealed. In such cases the rule is that the express repealing clause implies that the acts and parts of acts not inconsistent are not intended to be repealed, and consequently remain in force. Lewis' Sutherland, Statutory Construction (2d ed.), § 272. It was in obedience to this rule of construction that our practice act, Laws 1893, p. 407, although purporting on its face to revise the entire procedure in so far as it pertained to the commencement of actions, was held ineffectual to defeat a right to attach property before the service of a summons. Notwithstanding the sweeping range of the act and its evident purpose, the court, in *Cosh-Murray Co. v. Tuttle*, 10 Wash. 449, 38 Pac. 1134, did not find a specific intent to repeal or make impossible the exercise of an existing right, saying:

"There seems to have been no intention on the part of the legislature to abolish the attachment law to so great, or to

any, extent, and the new act ought to be construed so as to save the operation of the remedial statute, if possible."

The repeal, and as it seems to us by judicial process, of the entire law of exemption of the proceeds and avails of insurance moneys, was the consequence alluded to in the fore part of our opinion, and which, considering the avowed policy of the state as evidenced by the two entirely independent acts of 1895 and 1897, we sought to avoid.

We believe our argument is sound. Even zealous counsel will admit, we confidently believe, that we have considered all things and held fast to that which is good; that is, the exemption of the proceeds and avails of insurance policies to the beneficiary selected by the insured as the object of his bounty.

We adhere to our former holding. The petition for rehearing is denied.

[No. 13286. Department One. December 12, 1916.]

THE STATE OF WASHINGTON, *Appellant*, v. FERRY LINE
AUTO BUS COMPANY, *Defendant*, A. G. COLLINS *et al.*,
Respondents.¹

CRIMINAL LAW—RESPONSIBILITY OF AGENT—CARRIERS—MOTOR VEHICLES—VIOLATION OF STATUTE—CRIMINAL PROSECUTION. Agents and employees of a corporation aiding and assisting in the operation of jitney busses without a permit in violation of the jitney bus act (Rem. 1915 Code, § 5562-37) are also equally guilty with the corporation of a violation of the statute, although only the company was required to take out the permit.

STATUTES—TITLE AND SUBJECTS. The provision in the jitney bus act, Laws 1915, p. 227 (Rem. 1915 Code, § 5562-37 *et seq.*), requiring certain carriers to give a surety bond before engaging in business, is germane to and sufficiently included within the title "an act relating to and regulating common carriers of passengers upon public streets, roads and highways."

CONSTITUTIONAL LAW—CLASS LEGISLATION—MOTOR VEHICLES—REGULATION—STATUTES—VALIDITY. The jitney bus act (Rem. 1915

¹Reported in 161 Pac. 467.

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Code, § 5562-37), requiring carriers of passengers for hire in motor propelled vehicles on the streets of cities of the first class to give a surety bond and obtain a permit before engaging in business, is not unconstitutional as class legislation, or violative of the 4th and 5th amendments to the constitution of the United States.

CARRIERS—MOTOR VEHICLES—REGULATIONS — STATUTES—“COMMON CARRIERS.” A corporation organized for the purpose of carrying out a contract with the Port of Seattle whereby the corporation agrees to maintain and operate an auto service to and from the terminal of the ferry operated by the Port and certain designated points in the city, for the purpose of furnishing a transfer service for passengers going to and from the ferry, is a common carrier of passengers for hire, within the meaning of the jitney bus act (Rem. 1915 Code, § 5562-37), requiring such carriers to obtain a permit before engaging in business.

SAME. Such a corporation is not relieved from the necessity of complying with the jitney bus act by reason of the fact that its service is conducted by it as an integral part of a ferry system operated by a municipal corporation, since such corporation is amenable to the restrictions of the act in like manner as individuals.

Cross-appeals from a judgment of the superior court for King county, Mackintosh, J., entered January 4, 1916, upon a trial and conviction of violating the jitney bus act, upon sustaining a demurrer on behalf of the individual defendants, and a trial to the court as to the defendant corporation. Reversed on plaintiff's appeal; affirmed on defendant's appeal.

Alfred H. Lundin and W. F. Meier, for plaintiff.

James E. Bradford, William B. Allison, C. J. France, and Shorett, McLaren & Shorett, for defendant.

FULLERTON, J.—The appellant, Ferry Line Auto Bus Company, a corporation, together with A. G. Collins and George Collins, were jointly accused, by an information filed by the prosecuting attorney of King county, of engaging in the business of carrying passengers for hire in motor propelled vehicles along the public streets of the city of Seattle without first having a permit so to do, as required by ch. 57 of the Laws of 1915, p. 227 (Rem. 1915 Code, § 5562-37

et seq.) commonly known as the jitney bus act. To the information, each of the defendants filed demurrers. The demurrers of A. G. Collins and George Collins were sustained by the court, and on the election of the prosecution to stand on the information, a judgment of dismissal as to them was entered. The demurrer of the Ferry Line Auto Bus Company was overruled. The corporation then entered a plea of not guilty to the information, and on a trial, which was had before the court sitting without a jury, was found guilty and sentenced to pay a fine. The state appeals from the judgment of dismissal against the individual defendants, and the Ferry Line Auto Bus Company appeals from the judgment of conviction.

The record does not disclose the ground upon which the learned trial judge rested his decision as to the individual defendants, but it can be gathered from the argument of their counsel that it was thought that, since the principal only was required to have a permit before engaging in the business of carrying passengers for hire in motor propelled vehicles at the place named, these defendants, being merely the servants and agents of the principal, could not be guilty of a violation of the statute, even though they aided and abetted the principal in the execution of the unlawful act. This is not the law. No person committing or aiding or abetting in the commission of an unlawful act can shield himself from punishment by showing that he acted under the direction of or as the agent or servant of another. As was said by the supreme court of Tennessee in *Atkins v. State*, 95 Tenn. 474, 32 S. W. 391, the relations of principal and agent, employer and employee, are not recognized in the criminal law. By that law every man must stand for himself. No man can authorize another to do what he may not lawfully do himself. If the attempt to confer such authority be made, and the unlawful act be done, both are guilty. So Mr. Bishop, in his work on criminal law, says that the commands of a superior to an inferior, of a master to his servant,

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of a principal to his agent, will not justify a criminal act done in pursuance of it. (Bishop's New Criminal Law, § 355.) To the same effect are our own cases. In *State v. Burnam*, 71 Wash. 199, 128 Pac. 218, it was held that the manager of the active business of a corporation engaged in the business of selling milk was guilty of a violation of the statute prohibiting the selling of milk below a certain standard, although the milk was sold from one of the wagons of the corporation which left the dairy during the manager's absence. See, also, *Spokane v. Patterson*, 46 Wash. 93, 89 Pac. 402, 123 Am. St. 921, 8 L. R. A. (N. S.) 1104.

The defendants argue that, if every person who is in any way engaged in the unlawful business are included within the penal provisions of the statute, then each individual agent or employee must comply with the statute, regardless of whether the principal has complied with the statute or not. Notwithstanding it is asserted that this conclusion is inevitable, we have not been able to accept it. The principal is guilty because it engaged in the business without a compliance with the statute. The agents and servants are guilty because they aided and abetted the principal in the commission of the unlawful act. The principal can make its business lawful by a compliance with the statute. When once it is made lawful, clearly it is no offense for one as its agent and servant to assist in the prosecution of the business. We conclude, therefore, that the court erred in sustaining the demurrer of the individual defendants.

The principal question submitted on the appeal of the Ferry Line Auto Bus Company is the constitutionality of the statute upon which the prosecution is founded. This question was determined by us contrary to the appellant's contentions, in the case of *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837, where we held the act constitutional. The reasons for our holding are fully stated in the opinion in that case, and it is unnecessary to repeat them

here. On the authority of the case referred to, we hold the act constitutional.

The appellant makes a further contention that the statute is not applicable to its situation; first, because the statute applies only to common carriers of passengers and that it is not such a common carrier; and second, because the auto service conducted by it is an integral part of a ferry system operated by the Port of Seattle, a municipal corporation.

As to the first objection, it may be conceded that the statute applies only to common carriers of passengers in motor propelled vehicles, and we need notice the part of the objection only which denies that it is such a carrier. The record shows that the appellant was duly organized as a corporation under the laws of the state of Washington. Its articles of incorporation are not disclosed, but it is stipulated that it was organized "for the purpose of engaging in the performance of a certain contract with the Port of Seattle, as set forth in Exhibit 2," as a part of the stipulation. The contract so set forth, after reciting that the Port of Seattle maintains and operates a ferry service for carrying passengers between the business district of the city of Seattle to a portion of the city known as West Seattle, and that the appellant "for itself, its successors and assigns, is desirous of establishing an auto bus service so as to furnish a connecting service with said ferry for the inhabitants of the west side," provides that the appellant will maintain and operate, for a period of ten years, an auto bus service for carrying passengers to and from the terminal of the ferry at West Seattle and certain other designated points in the city named. There is no agreement that the appellant will carry any or all persons who present themselves for carriage, but only an agreement to furnish transfer service for passengers going to and from the ferry. It is on this latter fact that the appellant founds its contention that it is not a common carrier of passengers. But we think it manifest that the appellant is a common carrier of passengers. It must carry all persons up

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to the limit of its capacity who present themselves for carriage at the ferry landing, and all those who present themselves for carriage at any convenient point in its route for carriage to the ferry landing, and this makes it a common carrier of passengers whether it carries passengers between other designated points or not.

The second contention, we think, is equally without merit. In the first place, the service conducted by the appellant is independent of the services conducted by the Port of Seattle and is not an integral or any part of that service. While the service doubtless operates to the mutual benefit of both, the parties treated with each other as independent corporations, the Port of Seattle going so far as to exact a bond conditioned that the appellant would hold the Port harmless from any judgment obtained against either party "by reason of any person being injured on or by" the vehicles used by the appellant.

In the second place, it is not the rule that a municipal corporation can itself engage, or contract with another to engage, in the business of carrying passengers for hire in contravention of a public statute forbidding it. A municipal corporation, like every other corporation or person, must act within the law. Its acts otherwise are without authority, and subject its agents and servants who assist in the unlawful acts to liability as independent actors. Wharton, Criminal Law, § 377.

The judgment is reversed on the appeal of the state, and affirmed on the appeal of the Ferry Line Auto Bus Company.

MORRIS, C. J., CHADWICK, MOUNT, and ELLIS, JJ., concur.

[No. 13293. Department One. December 12, 1916.]

CANYON LUMBER COMPANY *et al.*, *Appellants*, v.

C. W. SEXTON *et al.*, *Respondents*, M. J. WALKER

et al., *Defendants*.¹

LANDLORD AND TENANT — UNLAWFUL DETAINER — PARTIES — MECHANICS' LIEN CLAIMANTS. Under Rem. 1915 Code, § 816, providing that no person other than the tenant or subtenant in actual possession need be made a party defendant in an action of unlawful detainer, and §§ 827, 830, providing for relief against the judgment by those claiming under or through the tenant, a person claiming a mechanics' lien against the interest of the tenant need not be made a party, and is nevertheless bound by the judgment as being in privity with the tenant.

SAME—STATUTES—VALIDITY. Such statute, compelling the lien claimants claiming through the tenant to seek relief under the statute, is valid.

SAME—UNLAWFUL DETAINER—JUDGMENT—RELIEF FROM — LIMITATIONS—STATUTES. Such act, in providing that the right to relief against the judgment of unlawful detainer "may" be exercised within a limited time, is not merely permissive, but precludes the idea that it can be exercised at some later time.

PLEADING—DENIALS—MATTERS OF RECORD. A denial on information and belief of matters that are of public record is bad.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon striking from a complaint matters of detail that were not material to the cause of action where their elimination left a sufficient statement of material matters to constitute a cause of action.

MECHANICS' LIENS—FORECLOSURE—PLEADING—VARIANCE — AMENDMENT. Where a claim of mechanics' lien sought to charge the fee of the property, and the complaint was based on the theory that it was a charge upon a leasehold interest, there was such a fatal variance as to require an amendment of the lien or of the complaint.

APPEAL—REVIEW—HARMLESS ERROR. Where some form of an amendment of a pleading was required, error in ruling upon a preliminary motion is harmless.

MECHANICS' LIENS — FORECLOSURE — AMENDMENT OF LIEN. In an action to foreclose a mechanics' lien, an amendment of the lien so as to charge only a leasehold interest will not avail the plaintiff where it appears that the leasehold has been forfeited under a judgment in unlawful detainer.

¹Reported in 161 Pac. 841.

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Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered January 23, 1915, in favor of the defendants, dismissing an action to foreclose mechanics' liens, upon sustaining a motion for judgment on the pleadings as to plaintiffs' cause of action, and sustaining a demurrer to the complaint of interveners. Affirmed.

William Sheller, Howard Hathaway, and Louis A. Merrick,
for appellants.

Sherwood & Mansfield, for respondents.

FULLERTON, J.—On December 12, 1913, the respondents, C. W. Sexton and Martha Sexton, his wife, leased to the defendants, Wolf Michelson and M. J. Walker, two certain lots in the city of Everett, for a term of five years commencing on the first day of January, 1914, at a rent reserved of \$25 per month, payable in advance on the first day of each and every month. The lease provided for a forfeiture of the term in case of a default in the payment of the rental, and also provided that any improvements made by the lessees should attach to and become a part of the realty. The lease was duly recorded. The lessees entered into possession of the premises and, while so in possession, caused to be constructed thereon a building for which they became obligated for material and labor. Among the persons to whom obligations were incurred, was the appellant Canyon Lumber Company, which furnished material of the value of \$1,081.47, the appellant Everett Shingle Company, which furnished material of the value of \$54, the appellant A. Strom, who furnished materials and labor of the value of \$73, and the appellant R. H. Carpenter, who furnished materials and labor of the value of \$20.30. The obligations not having been paid, each of the materialmen filed a lien upon the buildings and lots. The lien of the Canyon Lumber Company was filed on April 16, 1914. In it C. W. Sexton was named as owner of the property and the defendant Wolf Michelson as the lessee thereof, the lien being claimed against the leasehold interest of Wolf Michel-

son. The lien of the Everett Lumber Company was filed on April 16, 1914, naming the respondents, C. W. Sexton and Martha Sexton, his wife, as owners of the property and Wolf Michelson and M. J. Walker as lessees. The lien was claimed upon the interests of all of the parties named. The lien of A. Strom was filed on May 15, 1914, and that of R. H. Carpenter on May 28, 1914. Each of these liens also named C. W. Sexton and Martha Sexton as owners of the property and Michelson and Walker as lessees and claimed upon the interests of all of the parties.

The lessees failed to pay the rental for the months of April, May and June of 1914, and on July 23, 1914, Sexton and wife instituted an action under the statute of forcible entry and detainer to oust them from the premises and to declare a forfeiture of the lease. Judgment was rendered in this action on August 5, 1914, forfeiting the lease and awarding possession of the property to the plaintiffs. Reentry by the Sextons was made under this judgment and the property subsequently leased to the Paddock-Fowler Auto Company, which took possession thereof and expended some \$300 in betterments. None of the lien claimants were made parties to this proceeding.

On August 5, 1914, the appellant Canyon Lumber Company began an action to foreclose its lien. It made parties defendant to the action M. J. Walker and Wolf Michelson only, and sought a foreclosure upon their leasehold interest in the property described. On August 26, 1914, the other lien claimants asked leave to intervene in the foreclosure action and to make additional parties defendants thereto. On leave being granted, they filed a joint complaint, making additional parties defendant the wives of Walker and Michelson and the owners of the property, C. W. Sexton and wife, and sought foreclosure of their respective liens.

After the filing of the complaint in intervention, the Canyon Lumber Company amended its complaint, making parties defendant the additional parties named in the intervening complaint. The amended complaint also sought foreclosure

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upon the leasehold interests of Walker and Michelson, averring that the interests of the other defendants were subsequent and inferior to its lien.

After service upon them, the defendants Sexton and wife appeared and filed an answer to the complaint of the Canyon Lumber Company, in which, after making certain denials, they set up affirmatively the lease to Walker and Michelson, their failure to comply with the terms of the lease, the judgment of forfeiture, the reentry of the defendants thereunder, and the failure of the plaintiff, or any one on its behalf, to relieve from the judgment of forfeiture in the manner provided by statute.

The defendants also moved against the complaint of the interveners, on the ground that the causes of action of the interveners were severable and not joint and were not separately set forth. This motion the trial court sustained; whereupon each of the interveners filed a separate complaint. These complaints were substantially the same. In each of them the pleader set forth the materials furnished and the work and labor performed, averred that the materials were furnished and the work and labor were performed at the request of Walker and Michelson, who were the lessees of the property, and set forth the lien by copy. The prayer was for a foreclosure of the lien upon the building and the leasehold interest of Walker and Michelson, and so much of the land upon which the building stands as might be necessary for its convenient use or for the use of the plaintiff in removing the building, with other relief appropriate to the facts alleged.

Sexton and wife moved to strike certain portions of the several complaints, which motions the trial court granted. They then demurred to the complaint after the portion had been stricken, which the trial court sustained. The lien claimants thereupon asked leave to amend the lien notices and the complaints, supporting their several motions by affidavits. These were opposed by counter affidavits, and the leave denied. The claimants then announced that they would stand

upon their complaints, whereupon a judgment dismissing their several causes of action was entered.

The Canyon Lumber Company replied to the answer of the Sextons, making certain admissions and certain denials. It denied, on information and belief, the allegation of judgment and ouster and forfeiture of the lease in the action between the Sextons and Walker and Michelson. On the reply being filed, the Sextons moved for judgment on the pleadings. This motion was granted, and a judgment entered to the effect that the plaintiff Canyon Lumber Company take nothing by its action. The lien claimants appeal.

Noticing first the appeal of the Canyon Lumber Company, the court sustained the motion for judgment against the company because of the judgment of forfeiture and ouster in the forcible detainer action; holding that, since the lien of the claimants could attach only to the leasehold interest of the lessees to whom it furnished the materials, the lien failed with the forfeiture of the lease evidenced by the judgment pleaded in the answer; holding further, that the denial in the reply, since it was made on information and belief, did not put in issue the allegation of forfeiture by the judgment.

Our statutes relating to forcible entry and detainer provide (Rem. 1915 Code, § 816), that no person other than the tenant of the premises and subtenant, if there be one, in actual occupation of the premises when the complaint is filed, need be made a party defendant in any proceedings brought under the act; and further provide (§ 827) that, when the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of judgment, "within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored

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to his estate." It is also provided (§ 830) that the court may re-relieve a tenant against a forfeiture and restore him to his former estate, as in other cases provided by law, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court. The application may be made by the tenant or subtenant, or a mortgagee of the term, or by any person interested in the continuance of the term, but must be made upon petition of the person interested, and must be served on the plaintiff in the judgment, who may contest the application. And it is provided that in "no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions of covenants stipulated, so far as the same is practicable, be first made." The reply admitted, as we have stated, that the lien complaint did not comply with either of these conditions of the statute. Clearly, therefore, unless some reason intervenes rendering the statutes inapplicable, the court did not err in granting judgment on the pleadings.

The principal reason urged why the statutes are not applicable is that the lien claimant was not a party but a stranger to the action against the tenants; hence cannot be bound by the judgment of forfeiture and ouster rendered against them. But, as we have shown, the statute, in express terms, provides that only the tenant or subtenant in actual possession of the property need be made a party to the unlawful detainer proceedings, and with equal clearness prescribes the remedy for relief from a judgment entered therein by those claiming under or through the tenant. If these sections of the statute are valid, they are conclusive. While the appellant seems to question them, we have no doubt of their validity. It is within the power of the legislature to declare one dealing with a tenant of real property to be in privity of estate with such tenant, and to provide that notice to the tenant shall be notice to the party so dealing. The legislature

has done no more than this in this instance, and we hold the statute valid.

Again, it is said that the statute is not obligatory in its terms; that it uses the term "may" instead of "must," and is thus permissive and not directory. But the statute confers a right and prescribes the time within which the right may be exercised. To say that the right "may" be exercised within the prescribed time is to preclude the idea that it may be exercised at some later time.

It is urged, also, that the court erred in ruling that the denial was insufficient. But the ruling was in accord with the holdings of this court in the cases of *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752, and *Olympia v. Turpin*, 70 Wash. 581, 127 Pac. 210.

"A party cannot plead ignorance of a public record to which he has access, and which affords him all the means of information necessary to obtain positive knowledge of the fact." 1 Ency. Plead. & Prac., p. 813.

The case of *Stetson & Post Mill Co. v. Pacific Amusement Co.*, 37 Wash. 335, 79 Pac. 935, is cited as expressing a view contrary to the holding which we here approve. But that case, in so far as it touches the question presented, supports rather than opposes our present holding. That was a case where a lien claimant of a leasehold interest had foreclosed his lien and acquired the interests of the tenant. Prior to such sale, however, the landlord had forfeited the lease and peaceably reentered into possession of the premises. It was held that the lien claimant acquired by the foreclosure and sale only such rights as the tenant had, the court saying:

"By a foreclosure and sale, the appellant could acquire no greater rights in the leasehold estate than the persons against whom the foreclosure was had possessed therein (*Shannon v. Grindstaff*, 11 Wash. 536, 40 Pac. 123); and all such rights as the lessee, or her successors in interest, acquired by the lease had been forfeited and terminated, long before the sale under the judgment of foreclosure was made. Conceding that the appellant was not bound by the judgment of forfeit-

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ure, because not a party thereto, still its right to sell was barred by the peaceable re-entry of the lessors, for a breach of the covenants of the lease. Such re-entry, being for condition broken, was lawful, as against all persons claiming under the lease, and operated as a forfeiture of the rights of all such persons. It was essential to the rights of the appellant that the leasehold estate be preserved, and if it desired to prevent a forfeiture of such estate, and the consequent forfeiture of its own rights, as a lien claimant against such estate, it was necessary that it perform, or tender a performance of, the condition of the lease, before the lessors re-entered for default of such performance. As it did not perform, or tender performance, before that time, it cannot now recover damages by way of rentals or otherwise, merely because the lessors refused to let it occupy the premises for the balance of the leased term."

We conclude, therefore, that the court did not err in granting judgment on the pleadings as against the Canyon Lumber Company.

The appellants Strom, Carpenter and Everett Shingle Company first complain of the order of the court striking certain allegations from their second amended complaint. As certified in the transcript, these complaints appear as they were left after the stricken matters had been eliminated, and we are left to the motion to strike and the order granting the motion to ascertain the contents of the matters stricken. In so far as these disclose them, we find no error in the ruling. The allegations concerned matters of detail, in certain instances explanatory perhaps of the transaction, but contain nothing material to the cause of action attempted to be stated. Undoubtedly all of the matters could have been left in the complaints without seriously violating the rules of good pleading, but their elimination left a sufficient statement of the material matters constituting the cause of action. Again, the order was not harmful for another reason. With the matters remaining in the complaint it would be as susceptible to a demurrer, which was afterwards sustained, as it was so susceptible with the matters

eliminated. The action was to foreclose a materialman's lien. The lien was thus the foundation of the cause of action. The lien as filed sought to charge the fee of the property, while the complaint was based on the theory that it was a charge upon a leasehold interest therein. This was such a fatal variance as to require either an amendment of the complaint or an amendment of the lien, and the order sustaining the demurrer was right in either view. Since some form of amendment was finally required, error in ruling upon a preliminary motion does not require a reversal.

What we have said disposes of the second assignment, which claims error upon the ruling on the demurrer. The third assignment is on the refusal of the court to permit an amendment of the lien. As we have said, this motion was supported by affidavits and opposed by counter affidavits. The trial court concluded from the facts thus shown that an amendment could not avail the lien claimants even if allowed, and refused to permit an amendment for that reason; this because the leasehold interest had been forfeited by the judgment of a court at the suit of the respondents, and the lien claimants had not taken timely action to relieve themselves from the judgment of forfeiture. This finding was justified by the showing, and to allow an amendment and go through the form of trial would have been a useless act.

We find no error in the judgment of the trial court, and direct that it stand affirmed.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 13327. Department One. December 12, 1916.]

**E. H. KRANZUSCH, *Respondent*, v. TRUSTEE COMPANY,
Appellant.¹**

APPEAL—DISMISSAL—ABSTRACT—SUFFICIENCY. Under Rem. 1915 Code, § 1730-6, insufficiency of the abstract of the evidence or of its index is not ground for dismissal of the appeal, but only for motion to amend the abstract, upon terms.

APPEAL—RECORD—SUPPLEMENTAL ABSTRACT. A supplemental transcript containing matters not introduced in evidence and in no way material to the appeal will be struck out on motion.

SAME. Where the appellants' abstract on appeal is deemed insufficient, the respondent is privileged to file a supplemental abstract, even if it goes over the same ground; and if it be too full, the remedy is by motion to correct it, and not to strike.

CARRIERS—OF PASSENGERS—ELEVATORS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Evidence that a child entered an elevator holding its mother's hand and that the elevator started quickly with a sudden movement before the child had fairly entered, and that he fell to the floor of the cage, toward the open door and was caught by a projecting floor or mechanism of a projecting indicator over the door, warrants a finding of negligence in the operation and maintenance of the elevator; it being negligence to leave projecting floors or mechanism in the elevator well and at the same time operate the elevator cage with an open door.

DEATH—DAMAGES—INFANT—EVIDENCE—ADMISSIBILITY. In an action for the death of a minor child, evidence of the earning power of the child during minority is admissible.

EVIDENCE—OPINION EVIDENCE—EXPERTS—QUALIFICATION—ADMISSIBILITY. Upon an issue as to the earning power of a minor child, the qualification of the witness to testify as an expert as to the cost of rearing and educating the child is largely a matter of discretion, and the ruling will not be disturbed except for manifest abuse of discretion.

DEATH—MEASURE OF DAMAGES—EXCESSIVE DAMAGES. A verdict for \$3,576 for the wrongful death of a son, four years of age, will not be held excessive, in the absence of an affirmative showing of passion or prejudice; since substantial damages may be awarded.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 22, 1915, upon

¹Reported in 161 Pac. 492.

the verdict of a jury rendered in favor of the plaintiff, in an action for wrongful death. Affirmed.

Smith & Mack, for appellant.

A. E. Gallagher, for respondent.

FULLERTON, J.—Plaintiff's minor child, four years of age, was accidentally killed while a passenger in an elevator operated in an office building belonging to defendant. In an action for damages for such death, judgment was rendered in favor of plaintiff upon a verdict awarding \$3,576. The defendant appeals.

The respondent presents a motion to dismiss the appeal based on the grounds, (1) that appellant's abstract of record does not contain sufficient of the evidence and records to enable the court to pass upon the merits of the appeal, and that the evidence given is misstated; and (2) that the abstract is not indexed as required by statute and rules of court, in that the testimony of the witnesses is merely indexed under the head "Evidence, pages 4 to 30," without specially indexing the names of the individual witnesses. In respect to the motion, it suffices to say that the insufficiency of the abstract is not ground for dismissing the appeal, under Laws of 1915, p. 302, § 6 (Rem. 1915 Code, § 1730-6). By that section it is provided that, when the appellant's abstract of record is found to be "insufficient and defective under the terms of this act or the rules of the supreme court, the appeal shall not be dismissed by reason thereof, but the appellant may be allowed to file an amended or supplementary abstract . . . upon such terms as may be fixed by the order of the supreme court." The motion is not to require the abstract to be amended, hence its defects need not be considered.

The appellant moves to strike the supplemental transcript filed by respondent. This sets out the motion for new trial, order of court, and verdict of the jury in a prior trial of this same cause. The matter was not introduced in evidence,

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and we find it in no way material to the present appeal from the judgment on a second trial. The motion is granted.

The appellant also moves to strike respondent's supplemental abstract for the reason that it is a repetition of the original abstract, set out in ampler form and largely by questions and answers. This motion is denied. The supplemental abstract perhaps does go over the same ground as the original, but it is the respondent's privilege to file such an abstract where he deems the abstract presented by appellant inadequate or incorrect. Seemingly, the abstract is more full than the necessities of the case required, but the same rule applies to a supplemental abstract that applies to an original one; the remedy is to move to correct it, not to strike.

The principal ground urged as error is the insufficiency of the evidence to sustain the verdict. The assignments suggesting the question are grouped and argued by the appellant under the one head; namely, did the plaintiff make a case for the jury on any grounds of negligence alleged or proven.

The mother of the child and the child entered the elevator of the defendant's building on the second floor landing for the purpose of going to one of the floors above. The elevator was entered through a sliding door placed in the grill work which enclosed the elevator shaft or well. This grill work was set back three and one-half inches from the well, and extended upward to within four inches of the ceiling above. Across the gap of three and one-half inches, between the grill work and the well in which the cage moved up and down, the third floor projected horizontally into the well some three inches, forming, in connection with the grill work, a sort of cavity. The indicator, which showed passengers at what floor the moving cage was located, was placed above the sliding door in the grill work. This indicator was operated by a shaft on which were a wheel and set screw; this mechanism of shaft, wheel and screw extending into the open space on

the inside of the grill work about two and one-half inches. The movement of the elevator cage up and down would bring this wheel and set screw directly opposite the door of the cage. The cage had no inside door, and the door space was always open as the cage passed by the indicator mechanism thus extending toward the well, and as it passed the floor projecting into the well.

Respecting the manner of the child's death, there is no dispute in the evidence. In some way the child was thrown down at about the time the elevator started, so that his body protruded beyond the open door of the elevator cage, permitting it to be caught between the elevator floor and projecting floor of the building, drawn from the elevator cage and dropped to the bottom of the well as the elevator passed on. The evidence as to how the boy got into his precarious position is not so satisfactory. There were but two witnesses, the mother of the child and the elevator operator. Their testimony was conflicting. The mother testified—and it was the privilege of the jury to believe her—that she entered the elevator ahead of the child, holding him by the hand; that the elevator started quickly with a sudden movement before the child had fairly entered the elevator cage; that he was jerked from her hand, and fell to the floor of the cage; that he fell towards the door so that his body partially protruded through the door from the floor of the cage, and was caught on the projecting upper floor of the building as the elevator passed it. From this we think the jury were warranted in drawing the inference that the boy was thrown down either by the too sudden starting of the elevator, or that he was caught and thrown down by the projecting mechanism of the indicator, before he had fairly entered the elevator. Either finding would justify a finding of negligence.

We think, also, that the jury were warranted in finding that the elevator was negligently constructed and inherently dangerous, and that this was the cause of the death of the child. It may not be negligence in itself to leave projecting

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floors in the elevator well, or to construct indicators so that they project into the well. Nor, perhaps, is it negligence in itself to operate an elevator cage with an open door. But to operate an elevator where there is a combination of these conditions is negligence. We need not go beyond our own reports to discover that similar combinations have been the cause of a number of accidents even to grown persons, and that at least one other child has lost its life by reason of it. Proprietors of elevators are held to that same high degree of care other carriers of passengers are held, and it would be too much to say that the law forbids a recovery for an accident shown to have been caused by such conditions as were shown here. *Atkeson v. Jackson Estate*, 72 Wash. 233, 130 Pac. 102, 44 L. R. A. (N. S.) 349; *Hendrickson v. Grays Harbor R. & Light Co.*, 88 Wash. 145, 152 Pac. 992; *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054; *Davis v. Burke*, 90 Wash. 495, 156 Pac. 525; *Frescoln v. Puget Sound Traction, Light & Power Co.*, 90 Wash. 59, 155 Pac. 395.

The appellant further contends that the court erred in its rulings, both in the admission and exclusion of evidence. The evidence admitted which was objected to concerned the earning power of a boy during his minority. This evidence was plainly admissible. True, the witness' experience related to only one particular calling, but this did not render his testimony inadmissible, however much it might detract from the weight which should be given to it. On the other branch of the objection, the appellant complains that the court refused to permit it to show the cost of rearing the child, particularly in view of the fact that it was expected to give him the benefit of the common schools and a college education. But this is hardly a fair statement of the court's ruling. The court did not deny to the appellant the right to offer evidence upon the fact, but denied him the right to offer the evidence of a particular witness, holding that the witness had not qualified himself to testify thereon. The qualification of a witness to

testify as an expert on a subject requiring peculiar or special knowledge is largely a matter of discretion with the trial court, and its ruling thereon will not be reversed unless there has been a manifest abuse of that discretion. *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; *Halverson v. Seattle Elec. Co.*, 35 Wash. 600, 77 Pac. 1058; *Czarecki v. Seattle & S. F. R. & Nav. Co.*, 30 Wash. 288, 70 Pac. 750. The ruling here shows no such manifest abuse as to require a reversal.

Finally, it is urged that the verdict is not justified by the evidence, being too large. But the jury were entitled to return substantial damages. *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054. From the nature of the case, the amount of the damages could not be specifically proven. All the jury could do was to take into consideration the age, health and capacity of the child, the situation of the parents, and award such damages as to them should seem just. Actions of this kind are specially permitted by statute; Rem. 1915 Code, § 184; and the verdict should not be interfered with unless it appears affirmatively that it was the result of passion or prejudice, or so grossly exceeds a just award that this result must be presumed. No such condition appears here.

The judgment is affirmed.

MOUNT, CHADWICK, and ELLIS, JJ., concur.

[No. 13349. Department One. December 12, 1916.]

NORTHWESTERN NATIONAL BANK OF BELLINGHAM,
Respondent, v. GUARDIAN CASUALTY AND GUARANTY
COMPANY, *Appellant*.¹

MUNICIPAL CORPORATIONS—PUBLIC WORKS—CONTRACTS—ASSIGNMENTS—BOND—CLAIM OF LABORERS—PRIORITY. Where a bank, prior to notice of nonpayment for labor and material, took from a contractor on public works assignments of all moneys to become due to the contractor as security for advances to the contractor, and the contract contained no provision for a reserve of any percentage as security for labor and material claims but merely permitted the city to withhold payment until satisfied that all labor and material claims had been paid and on completion of the work the city paid the balance due into court, the assignments are valid appropriations of the fund afterwards paid by the city into court, prior and superior to any rights of laborers or materialmen, and hence superior to any right of subrogation in the surety on the contractor's bond.

SAME. The fact that a bank had, pursuant to agreement, advanced money to a contractor on public works, does not prevent it from taking assignments of labor claims, or impose the duty of paying.

SAME. An assignment of claims for labor against a contractor on public works includes not merely a right to receive the pay due, but operates as an equitable assignment of the laborer's rights against the contractor's bond.

SAME. A contractor having assigned to a bank the sums to grow due on a city contract as collateral for advances, before any default of the contractor, sums due the contractor are to be first applied to repay the advances; and the balance, if any, *pro tanto*, to pay labor claims assigned to and held by the bank, and the bank is entitled to judgment against the contractor's surety on its bond for the balance of the lienable labor claims.

SAME. In such a case, the bank holding assignments of claims by the contractors and their stenographer, which were not lienable claims, cannot assert any right therefor, against the fund due in court or against the bond, as against the surety on the bond paying labor claims.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered July 16, 1915, upon

¹Reported in 161 Pac. 473.

findings in favor of the plaintiff, in an action to recover money advanced to a contractor on public work, tried to the court. Modified.

Reeves Aylmore, Jr., and S. H. Kelleran, for appellant.

Black & Black, for respondent.

ELLIS, J.—The facts of this case are in part stipulated and are not disputed. On August 25, 1913, defendant city entered into a contract with defendants Brooks & Olsen for the construction of a certain trunk water main, and at the same time took from Brooks & Olsen a bond signed by them as principals and by defendant Guardian Casualty and Guaranty Company as surety, conditioned as follows:

“The conditions of this obligation are such, That if the said principal shall perform said contract which is hereby expressly referred to and made a part hereof, according to its terms, conditions and stipulations, and shall pay as they become due, all just claims for all work and labor so performed, and all skill, or labor and all laborers, mechanics, sub-contractors and material men and all persons who shall supply such person or persons or sub-contractors with provisions and supplies for the carrying on of said work, all just debts, dues and demands incurred in the performance of said contract, and shall comply with all the requirements of the charter and ordinances of the city of Bellingham and the statutes of the state of Washington, then this obligation to be void, otherwise to remain in full force and effect.”

The penalty in the bond was \$25,125.50. The contractor entered upon the performance of the work, and soon after went to plaintiff bank and arranged for loans of money with which to carry on the work. The bank, as a condition to the making of the loans, required the contractor to execute to it an assignment of all warrants to be issued by the city under the contract, which assignment was to be collateral security for the payment of the loans. The contractor accordingly did execute, on or about the dates they bear, assignments as follows:

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"City Comptroller,

Sept. 8, 1913.

"Bellingham, Wash.

"Dear Sir: Will you kindly deliver to the Northwestern National Bank, all warrants or amounts due us on account of the new concrete water ditch, which contract was recently awarded to us. Yours truly,

Brooks & Olsen,

"C. M. Olsen.

"Mr. H. J. Korthaur,

Sept. 24, 1913.

"City Comptroller, Bellingham, Wash.

"City

"Dear Sir: Please pay to the order of the Northwestern National Bank all the water fund warrants for construction of Trunk Water main from Lake Whatcom to Larsons Station under ordinance No. 2019. Yours truly,

"Brooks & Olsen

"Per Brooks & Olsen

"by Wesley Brooks."

These assignments were at once filed with the city comptroller. Thereafter, from time to time as the work progressed, plaintiff advanced to the contractor various sums upon their eight per cent demand notes, aggregating \$21,700. From time to time, also, as warrants became due for the work, they were paid by the city in the sum received by the bank, which were applied on these notes in such amount that there now remains due upon the notes the sum of \$2,300, with interest. All of the moneys advanced by the bank and evidenced by these notes was used by the contractor in the prosecution of work under the contract. In March, 1914, the bank ceased to make advances upon the notes to the contractors, but from that time on cashed time checks and vouchers issued by the contractors for labor and material entering into the work. Each of these checks bears the indorsement, "For value received I hereby assign to the Northwestern National Bank all my right, title and interest to the within time check." None of the moneys received from the city were credited by the bank to any of these checks. The time checks for labor, exclusive of three, total \$5,864.91. The three time checks excluded were issued, one to the contractor Olsen in the sum

of \$245, another to the contractor Brooks in the sum of \$205, and the third to Cora E. Nyman, the contractors' bookkeeper and stenographer, in the sum of \$130—total \$580. The checks for material total \$1,211.96. The contract provided that:

"The said contractor agrees to pay the wages of all persons and for assistance of every kind employed upon or about said work, and for all materials purchased therefor, and the said city of Bellingham may withhold any and all payments under this contract until satisfied that such wages, assistance and materials have been fully paid for."

It did not contain the usual provision for the payment of a certain percentage of the estimated value of work as it progressed, and for a retention of a certain percentage by the city until the work was completed to meet any unpaid labor and material claims, nor did it contain any provision for the holding up of any sum by the city, except that above quoted. This action was brought by the bank to recover the \$2,300 balance due upon the notes and the amount of the time checks cashed by the bank. The city answered that, in addition to the payments made to the bank under its assignments, it had paid labor and material claims, and still had on hand the sum of \$3,383.95, but was unable to determine to whom this sum rightfully belonged, and that it therefore brought the money into court "for distribution by the court according to the various rights of the claimants therefor." Defendant guaranty company answered, alleging that it had paid certain claims properly filed against the bond, and claimed subrogation to the rights of the contractors. Upon the trial, it was stipulated that defendant guaranty company was the assignee of material claimants whose claims aggregate the sum of \$2,323.26. The contractors defaulted. The bank first claims the right to have paid from the funds in court the \$2,300 and interest still due upon the notes, by reason of the assignments of money to become due under the contract. It then claims that the balance of the fund in court should be

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applied upon its labor and material claims, and finally, that it is entitled to judgment against the guaranty company on its bond for the remaining amount. The bank filed no claims against the bond for the \$2,300 advanced to the contractors upon the notes. It did, however, file its claim with the city, within thirty days after acceptance of the work, for the labor and material claims which it had paid and of which it had taken an assignment. Upon these facts, the trial court sustained the claims of the bank in full. Motion for a new trial was made and denied. Defendant guaranty company appeals.

As pointed out in the statement of the case, the bank is asserting three classes of claims: (1) The \$2,300 and interest due upon the notes for which no claim has been filed against the bond. This it claims solely from the money in court by virtue of its assignments from the contractors. (2) The labor and material claims which the bank has discounted and of which it took assignments, other than the Brooks, Olsen and Nyman claims. (3) The Brooks, Olsen and Nyman claims. We shall notice these in their order.

I. Appellant contends that the first item of \$2,300 and interest cannot be paid from the money in court because it is inferior to all of the labor and material claims, both those held by the bank and those held by appellant. Respondent bank contends that, as to the \$2,300 advanced on the assignments made to it by the contractors and of which the city was notified, it has a right to the fund held up by the city superior to any right of the surety company for moneys which that company was compelled to pay for labor and material. This claim is based upon the case of *Dowling v. Seattle*, 22 Wash. 592, 61 Pac. 709. The contract and supplemental agreement in that case contained a provision the same as that above set out as found in the contract here involved, that the city "may withhold any and all payments under this contract until satisfied that such wages, assistance and materials have been fully paid for." But the contract in

that case contained a provision also to the effect that bonds and warrants were to be issued on about the 20th of each month during the progress of the work for seventy per cent of the contract price, upon estimates of the city engineer covering the work done during the preceding month, the other thirty per cent to be retained to secure laborers and materialmen who shall have performed work or furnished materials therefor. The bond in the *Dowling* case was conditioned for the faithful performance of the work and for the payment of labor and material furnished upon and for the work in accordance with the contract and supplemental agreement. Prior to his default in the work, the contractor borrowed money from various persons, representing to them that he needed the money to pay for labor and materials consumed in the work. To these persons he gave assignments or orders on the city comptroller for money then due or to become due on estimates for work done under the contract. These assignments and orders were filed with the comptroller. The contractor, after having earned \$1,895.70 on the contract, abandoned the work, leaving laborers and materialmen unpaid. Prior to this he had received from the city a bond of \$500 in part payment of work done under the contract. So far as the opinion shows, this was the only bond or warrant issued prior to completion of the work. After the contractor defaulted, the bondsmen completed the improvement in accordance with the contract. On the completion of the contract, bonds and warrants were issued in the name of the contractor for \$3,459.10 in payment for the work. The bondsmen brought action to compel all of these bonds and warrants to be turned over and paid to the laborers and materialmen to the exclusion of the contractor's several assignees. The city deposited the bonds and warrants so issued in court to abide its judgment. The court held that, because the assignments and orders were made and accepted by the city prior to the contractor's default, they operated as an equitable assignment of so much of the fund in the city's

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hands as was necessary to pay them, and that they were not invalidated by the subsequent default of the contractor. The court said:

"It is true that the city, by virtue of a provision of the agreement which we have hereinbefore noted, *might* have withheld all payments from the contractor until it was satisfied that all just claims for labor and materials had been fully paid; but it does not follow from that fact, as contended by the learned counsel for appellants, that it was obliged to do so, and that, having done otherwise, it should now be held to be a trustee of the laborers and materialmen, and, as such, liable to them directly for the amount of the fund assigned and of the bond delivered to the contractor. If these appellants had had a lien upon this fund, as they had upon the thirty per cent of the amount of the monthly estimates which was withheld by the city, there would be at least some ground for the claim that the city is their trustee. But, in the absence of such lien, this contention cannot be sustained."

Touching the claim of the bondsmen of a right of subrogation to the fund in court as against the contractor's assignees, this court said:

"The city, as we have seen, claimed no right in or to the fund earned and assigned by Forest [the contractor]; and therefore, so far as that fund is concerned, there is no right to which the appellants could be subrogated. Certainly Forest could not justly claim that his assignments were invalid, and his bondsmen, having assumed and performed his contract, cannot claim anything which he could not."

If the last mentioned provision of the contract, permitting the city to withhold any and all payments until satisfied that wages, assistance and materials had been fully paid for, had no force as to assignments made without notice of the contractor's intention to default and accepted by the city without such notice, as held in the *Dowling* case, we can see no reason why the same provision should be held to have any force as against the assignments in this case, which were made by the contractors and accepted by the city under exactly the same circumstances.

But appellant here contends that the *Dowling* case was either overruled or modified in this particular by our decision in the case of *First Nat. Bank v. Seattle*, 71 Wash. 122, 127 Pac. 837. In that case, it does not appear just when the assignment was made by the contractor, Steenstrup, to the bank, but in the opinion it was intimated that it was not made until after the city had notice of the contractor's default. The money in controversy there, it was admitted, was a balance in the city's hands of the contractor's seventy per cent fund provided for in the contract. The entire thirty per cent authorized to be held up by the city had been paid out by the city to laborers and materialmen and was not involved. The bank claimed that its right to this balance of the seventy per cent under its assignment was free from all claims of laborers and materialmen. The contract contained both of the provisions found in the *Dowling* case, namely, (1) that seventy per cent on estimates should be paid to the contractor as the work progressed and thirty per cent should be held as security for laborers and materialmen; and (2) that the city might withhold all payments until satisfied that all claims for laborers, materials and assistance had been paid in full. The assignment to the bank, however, contained an express stipulation that it should not be valid against any claims for labor, materials, provisions and goods supplied and furnished in the prosecution of the work. There was no such stipulation in any of the orders or assignments in the *Dowling* case, nor in the assignments in the case now before us. On these facts we held, in *First Nat. Bank v. Seattle*, *supra*, that the assignment to the bank was subject to the claims for labor and materials as to this seventy per cent fund. We did not overrule or modify the *Dowling* decision, but distinguished it in that the stipulation in the assignment that it was not valid as against labor and material claims, which was not found in the *Dowling* assignments, made the assignments subject to such claims. This distinction is obviously sound and sufficient.

The other distinctions attempted in the *First Nat. Bank* case we are now satisfied are not sound. It is true that we said that the payments in the *Dowling* case were made when due under the contract and without notice of adverse claims. This is not strictly accurate, for in the *Dowling* case the actual payments were not made until after the work had been completed by the bondsmen and all funds brought into court, and then only on an order of the court. When we said in the case of the *First Nat. Bank v. Seattle* that, in the *Dowling* case, the seventy per cent had been paid when due and without notice, we were evidently speaking loosely of the assignments without notice as equivalent to payment, which, under the holding in the *Dowling* case, they were as between the contractor and the assignee. Hence they bound the bondsmen. A reexamination of the record in the case of *First Nat. Bank v. Seattle*, shows that the contract there involved was let in June, 1909. The assignment was made to the bank by Steenstrup, the contractor, on January 4, 1910, and notice of the assignment was filed by the bank with the city comptroller on January 6, 1910. The record and the briefs show that this must have been before any notice of failure on the contractor's part to pay the laborers and materialmen. This was the precise situation also in the *Dowling* case. It follows that the only just distinction between the *First Nat. Bank* case and the *Dowling* case must be found in the fact that, in the former case, the assignment to the bank itself provided that it should be invalid as against claims for labor and materials, while in the *Dowling* case, the assignments contained no such stipulation. In other respects, the facts in the two cases were parallel. The other distinctions made in the *First Nat. Bank* case, therefore, do not seem to be justified by the record. That the *Dowling* case is still the law of this state as applied to the same state of facts as there found is manifest from the very recent decision in *Maryland Casualty Co. v. Washington Nat. Bank*, 92 Wash. 497, 159 Pac. 689. In that case, as in the *Dowling* case, the contract provided for

payment to the contractor as the work progressed of a certain percentage of the money earned—in that case eighty per cent instead of seventy per cent—and for a retention of the balance—in that case twenty per cent instead of thirty per cent—as security for labor and material claims, and hence available to the surety who had to pay such claims. At the close of the work, the contractor had received his eighty per cent in full, and after notice of claims for labor and materials had been filed with the highway board and the money had been ordered held up by that board, the bank, with the culpable connivance of the county auditor, procured and cashed warrants for the remaining twenty per cent under assignment to it previously made by the contractor. We held, in substance, that this twenty per cent was a trust fund for labor and material claimants and was not subject to assignment, either as against them or as against a surety who paid such claims, but that the eighty per cent would have been subject to the assignment had it not already been paid to the contractors. In this connection we said:

“In the *Liebes* case [*State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26], and in *First Nat. Bank v. Seattle*, 71 Wash. 122, 127 Pac. 837, we announced a trust to creditors in a contractor's reserved balance. Here, holding the surety liable for the contractor's debts by a contract supplementing statutory obligations, we have a surety's right of subrogation to that balance should he be compelled to pay the principal's creditors, and of his right to prevent the dissipation of the fund. In this portion justice must rigorously protect the surety. His expectation when he goes on the bond is plain; the principal may squander eighty per cent, leaving the surety at the mercy of the creditors, but there is at least twenty that will be applied to the creditors in spite of him. This amount, originally reserved to protect merely the creditors, is a collateral security of the principal available to the paying surety.”

We have italicized the controlling language for emphasis. This is a distinct holding that it is only where there is a clear and express reservation in the contract of a fund to

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be held up for the benefit of laborers and materialmen that there is any fund the contractor may not effectually assign by an assignment made prior to his default and notice of such default to the board or, as in this case, to the city, and that it is only as to such reserve fund that the labor and material claims have any priority over such assignments, hence only as to such reserve fund that there is any right of subrogation in favor of the bondsmen. It is true that in the *Maryland Casualty Co.* case we cited *Prairie State Nat. Bank v. United States*, 164 U. S. 227, and *Henningesen v. United States Fidelity & Guar. Co.*, 208 U. S. 404, in which cases it was held that, under the United States statutes and decisions, the whole contract price for public works is a trust fund for the payment of labor and material claims to which the bondsmen are subrogated as of the date of their bond, but it is manifest from what we have quoted above that we cited these cases only on the question of the surety's right of subrogation to the twenty per cent reserved, not as adopting the view that the whole of the contract price was a reserve fund under the contract which we were then considering.

In the case before us, the bank had taken assignments of all moneys to become due to the contractors as security for the notes, on which there remains a balance due of \$2,300. These assignments were taken and filed with the city comptroller prior to any notice to any one that the labor and material claims had not been paid or would not be paid. The contract itself contained no provision for an absolute reserve of any percentage as security for labor and material claims. It contained nothing but a provision permitting the city to withhold payment until satisfied that all labor and material claims had been paid. Nothing, however, had been held up by the city at the time the assignments were made. It follows that, under the rule in the *Dowling* case, the contractors' assignments to the bank must be treated as a valid appropriation of the fund which was afterwards paid into court to the payment of the bank's notes, including this balance of

\$2,300, prior and superior to any right of laborers or materialmen, hence superior to any right of subrogation in the surety. As said in the *Dowling* case, "These assignments being valid when made and assented to by the city, were not invalidated by the subsequent default" of the contractor. Any other view would make it impossible for the ordinary contractor to finance a large contract by obtaining credit with a bank on the strength of its performance.

We find no merit in the claim that the bonding company has a superior equity in this fund over that of the bank. It has no equity in the fund as against the bank, which paid its money on the strength of assignments of the fund at a time when the contractors had full right to collect and dispose of the fund as they saw fit. Moreover, it is an admitted fact in this case that the money advanced by the bank was actually used by the contractors in the performance of the contract, thus diminishing the bonding company's liability by just the amount advanced. The equities are obviously with the bank.

II. We now come to the labor and material claims (other than the Olsen, Brooks and Nyman claims) assigned to the bank. Appellant first contends that, inasmuch as the bank had agreed with the contractor to advance money for the performance of the contract, it had no right to do anything but pay these claims; that, therefore, these claims must be treated as paid and extinguished so far as the bond is concerned. This position is untenable. The claims were assignable and were assigned to the bank. The contractors are not asserting any breach by the bank of any contract with them. The bank had never undertaken to indemnify the surety company against these or any other claims. It had the same right to purchase and take an assignment of these claims that any one else would have had.

It is next urged that the assignment of these labor and material claims, in any event, carried no right to assert them against the bond. It is argued that the right of the laborer or materialman is merely a right to receive his pay under

the express or implied contract with the contractors, and that this is all the right he has by virtue of his contract; that, therefore, the assignment of the time checks was only an assignment of a right of action against the contractors. This view is too narrow. It is only by virtue of his right to receive his pay from the contractor that the laborer or materialman has any right assertable against the bond as a contract made for his benefit. His right against the bond is ancillary to and dependent upon his right against the contractors. The first right is dependent upon the second. An assignment of the second, therefore, operates as an equitable assignment of the first. *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345.

Nor do we find merit in the further claim made under the rule announced in the case of *Sturtevant Co. v. Fidelity & Deposit Co.*, 92 Wash. 52, 158 Pac. 740, that, as between the bank and the surety company, the moneys which were applied in payment of the first sums advanced to the contractor by the bank should be applied on the labor and material claims now held by the bank, because the surety company is surety for the labor claims and not surety for the claims upon which the application was made. The fund having been assigned as collateral to the bank's notes before any default of the contractors or notice of their intention to default, the assignment was valid and binding as against the city and the contractors, and as held in the *Dowling* case, valid as against laborers and materialmen, hence valid as against any future claim of the bonding company. The bank's knowledge of whence the money came was therefore immaterial. The question here involved was neither discussed nor decided in the *Sturtevant* case.

We are constrained to hold that the respondent bank is entitled to have the moneys in court applied first to the payment of this \$2,300 and interest, and to have the balance applied in payment *pro tanto* of its claims for labor and materials, and that it is entitled to judgment against the

appellant surety company on its bond for the balance of these claims, with interest.

III. As to the Olsen, Brooks and Nyman claims, a different case is presented. Neither of these parties had any claim assertable, either against the fund in court or against the bond, to the exclusion of the appellant's right of subrogation. Olsen and Brooks were the contractors. Miss Nyman was their bookkeeper and stenographer. None of them had a lienable claim. The assignments of their claims carried no rights except rights of action against the contractors personally.

The cause is remanded for modification of the judgment in accordance with this opinion.

MORRIS, C. J., MOUNT, CHADWICK, and FULLERTON, JJ., concur.

[No. 13418. Department One. December 12, 1916.]

W. F. CRADDICK, *Plaintiff*, v. H. A. EMERY *et al.*,

Respondents, ADELBERT FOURNIER, *Appellant*.¹

PATENTS—SALE OF INVENTION—FAILURE OF CONSIDERATION. Notes given for a valueless unpatentable device, upon representations that it was valuable and patentable, are without consideration.

SAME—SALE—CONSIDERATION—ESTOPPEL. A purchaser of a mechanical device who was not a mechanician is not estopped to assert, want of consideration by the fact that he made his own investigations and inquiries before purchasing, where it appears that he relied upon the seller's statements that it was valuable and patentable rather than upon opinions of those of mechanical knowledge who examined it casually and believed it impracticable.

Appeal from a judgment of the superior court for King county, Jurey, J., entered October 2, 1915, upon findings in favor of certain defendants, in an action on a promissory note, tried to the court. Affirmed.

¹Reported in 161 Pac. 484.

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Walter B. Allen, for appellant.*C. H. Winders*, for respondents.

FULLERTON, J.—W. F. Craddick, claiming as indorsee of a promissory note, instituted this action to recover thereon. In his complaint he set forth a note for \$1,000, purported to have been executed by H. A. Emery and C. E. Lawson to Adelbert Fournier, and by Fournier indorsed in blank and delivered to him. Judgment was demanded against the indorsee as well as the purported makers. To the complaint, Fournier answered, setting up want of notice of nonpayment at the time of the maturity of the note. Emery filed an answer in which he admitted the execution of the note, and, by way of an affirmative defense, set up that the note was one of three of equal amounts given to Fournier for an undivided half interest in a mechanical contrivance for power transmission, which the payee of the note falsely and fraudulently represented to be of value and capable of being patented; further alleging that the contrivance afterward proved to be of no value and nonpatentable, and that the notes were thus without consideration; further alleging, also, that Craddick was not a purchaser for value of the note sued upon, but took the same with notice of its want of consideration. He set forth, also, certain payments made to Fournier on account of the dealings between them in making a working model of the mechanical contrivance, aggregating \$1,967.70, for which sum he demanded judgment against Fournier.

Lawson answered, denying all of the material allegations of the complaint, and set up two affirmative defenses. In the first of these, he alleged that he was an indorser of the note for Emery, and that notice of nonpayment of the note at maturity was not given him. In the second affirmative defense, he set up want of consideration for the note, substantially in the language of the affirmative defense interposed by Emery. Whether Craddick replied to the affirmative matter in the answers of Emery and Lawson is not disclosed by

the transcript. Fournier replied, putting in issue the affirmative matter in both answers. He also filed a cross-complaint against both Emery and Lawson. Against Emery, he alleged that he had evolved a device for a power transmission and clutch for an automobile; that he showed this to Emery, who became interested therein; that, in consideration of the assignment of a half interest to Emery, they then entered into a contract whereby Emery agreed to employ him at fifteen dollars per week during such time as it would take him to make a working model of the device, pay all costs for patenting the same, manufacture the same for the market, and divide the profits derived from the sale of the manufactured product with him; further alleging that he completed the working model, whereupon Emery broke the contract, and that thereupon he demanded a cancellation of the same and a redelivery of Emery's interest to him; that Emery refused his demand; that the same was worth \$3,000, and for this sum he demanded judgment against Emery. Against Lawson, he set up a breach of a contract to procure him bankable notes for an interest in his invention, whereby he was damaged in the sum of \$1,000. The cross-complaint against Emery was put in issue by a reply, and a demurrer was interposed and sustained to the cross-complaint against Lawson, and no amendment of the pleading was sought or allowed.

At the trial the evidence was mainly directed to the issues as framed between Craddick and the defendants Emery and Lawson, but little if any evidence being on the issues between Emery and Fournier. The court held the note in suit to have been given without consideration, that Craddick took the same with notice, and entered a judgment to the effect that he take nothing by his action. The court also denied recovery to Fournier on his cross-complaint against Emery, adjudging that his cause of action be dismissed. Fournier alone appeals.

The assignments of error are all directed against the findings of the court in so far as they affect the controversy be-

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tween Craddick and the respondents Emery and Lawson, the contention being that the findings are against the preponderance of the evidence. Since Fournier in his pleadings claimed no interest in a recovery by Craddick, but, on the contrary, treated his indorsement of the note as passing his title and interest therein to Craddick, it is difficult to see what appealable interest he has in the controversy between them. But conceding that he has such an interest, and that his pleadings are capable of amendment in that respect, we find no error in the findings of the court on the evidence.

Without reviewing the evidence in detail, and setting forth only its salient features, it tended to show that Fournier had conceived a transmission device and clutch for use on automobiles. This he showed to Emery, who owned and conducted a machine shop, representing to him that he had had the patent office searched and that the device was patentable and would infringe upon no other patent except perhaps a clutch which he (Fournier) had theretofore patented. Emery was impressed with the device and the parties entered into a contract by the terms of which Emery, in consideration of a half interest in the device, agreed to furnish the necessary materials, give him the use of his machine shop and tools for the purpose of making a working model, and pay him fifteen dollars per week during such time as would be required for that purpose; further agreeing to pay the expense of procuring a patent for the device. After the model had been completed, but before it had been tested out and before it was found not to be patentable, Fournier attempted to sell his remaining half interest to Lawson. Emery, hearing of this and still believing in the feasibility of the device, claimed a preference right in himself to purchase the interest. An agreement was thereupon entered into between them by which Emery agreed to buy Fournier's interest for a consideration of \$3,000. The sale was consummated by an assignment of the half interest and the delivery by Emery to Fournier of notes of the face value of \$3,000. These proved not to be

bankable; whereupon they were returned to Emery, who gave new notes in lieu thereof indorsed by Lawson, one of such notes being the note in suit. The device thereafter proved not to be very efficient or of any value from a commercial standpoint and not to be patentable, the device infringing upon the patents of others. The evidence also disclosed that, while the device was in the process of construction, it was examined by a number of persons purporting to have mechanical knowledge, and by many of them pronounced impracticable and of no value, and that Emery was informed of the fact, but nevertheless afterwards consummated the purchase.

The evidence makes it clear that Emery received nothing of value for his notes. Not only did the device itself prove inefficient, but what is more to the point, the device proved an infringement upon other patents, thus rendering it commercially valueless even had it been what its inventor claimed for it and what Emery was led to believe it to be.

In *Arnold v. Wilt*, 86 Ind. 367, notes were given for certificates in a marriage benefit association, which ceased to do business within a few days after the notes were given, rendering the certificates wholly worthless. In an action upon the notes the maker set up want of consideration. The court said:

"This evidence fully establishes the defence of want of consideration, because it proves that the thing given the appellee for his note was utterly worthless. The case is not that of one receiving some consideration and judging for himself of its adequacy, but that of one receiving a thing utterly destitute of value. In short, there is a total absence of consideration."

In *Smith v. Hightower*, 76 Ga. 629, the action was upon a promissory note. The defendant set up that the note was given in consideration of the exclusive right to sell two patents, one for "patent grazers" and the other for "patent buggy attachments," in two named counties within the state

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of Georgia; and that the devices were utterly worthless and unsuitable for the purposes for which they were made. The jury found for the defendant, the court denied a new trial, and the plaintiff appealed. The court on the appeal held:

"There was no error in overruling a demurrer to the plea. It rested on the ground that defendant did have the right to sell in those counties, and therefore the consideration did not fail; but it is hard to understand of what value is the exclusive right to sell a worthless thing, totally unfitted for the use for which it was manufactured; and if valueless, we do not see where the consideration to sell it can be found. Its adaptation to the use for which the machine is made is always warranted."

In *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804, the facts and the conclusion of the court were stated in the following language:

"The original note was given for the sole right to make, use and vend in the state of Colorado a patent right improvement in what is called a '*sad iron*,' of which Smallstig, one of the payees, claimed to be the patentee. The consideration expressed in the bill of sale is \$5,500. The sale was made after several visits by Smallstig and wife, and Smallstig and Onstott, and various and divers statements and misrepresentations as to the usefulness and salableness of the iron; that one pint of alcohol only would be required to run it per day, when in fact Mrs. Leedy testified that it would take \$2, \$3 or \$4 worth per day; that she never could get it hot enough to do good work, and that it was the greatest fraud ever invented; that before they purchased the right she asked Smallstig to leave one of the irons with her for a few days so that she could try it before trading, but that he declined to do so, giving as a reason that he did not have a spare one.

"The original note being void because of the inability of the payor, Mrs. Leedy, to make a contract of this kind on account of her coverture, it was void in the hands of plaintiff as indorsee even without notice of the fact that it was obtained by fraud, and was without consideration; and, although the last note was given in renewal of the first, there was no consideration therefor, and it was subject to the same

defenses as was the original note. And not only this, but the evidence shows conclusively that it too was obtained by fraud and deceit on the part of Milner, who was plaintiff's agent.

"The only consideration for either of the notes was the right to the state of Colorado in the patented iron, which the evidence shows is worthless and unsuited to the purpose for which it was made. The adaptation of a machine to the uses for which it is made is always warranted. *Smith v. Hightower*, 76 Ga. 630; Daniel on Negotiable Instruments, sec. 203, p. 226. So generally, if the thing purchased was entirely worthless when purchased, there is a total failure of consideration. *Arnold v. Wilt*, 86 Ind. 367; *Brown v. Weldon*, 27 Mo. App. 251. There is a total absence of consideration for either of the notes."

So Daniel on Negotiable Instruments (6th ed.), at § 203, states the rule as follows:

"Where the patented machine is worthless and unsuited to the purpose for which it was made, the consideration of a note given for the right to sell it totally fails. The adaptation of a machine to the uses for which it was made is always warranted."

These principles apply to the facts before us. The note having been given for a valueless unpatentable device, represented to be valuable and patentable, there was no consideration for it.

The appellant, however, seeks to invoke a rule of estoppel, contending that the purchaser when making the purchase relied upon his own investigations and inquiries, not upon the representations of the seller or upon the implied warranties arising from the character of the device sold. But if this principle would permit of a recovery under the facts assumed, the evidence does not justify the conclusion drawn. While the evidence shows that the purchaser was convinced of the feasibility of the device, so much so, indeed, that he expended some \$2,000 in trying to perfect and patent it, it also shows that he was not a mechanician and relied upon the seller's statements and representations rather than upon

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Syllabus.

the opinions of those who examined it only casually and expressed belief in its impracticability.

The judgment is affirmed.

MORRIS, C. J., MOUNT, ELLIS, and CHADWICK, JJ., concur:

[No. 13424. Department One. December 12, 1916.]

W. R. BALLARD *et al.*, *Appellants*, v. ALASKA THEATRE
COMPANY, *Respondent*.¹

FIXTURES—LANDLORD AND TENANT—TRADE FIXTURES. Under a fifteen-year lease of premises upon which the lessee agreed to erect a theater building to cost not less than a certain sum, and to pay a fixed rental for the term, the usual furnishings, which were not mentioned in the lease, such as removable electric fixtures, opera chairs, picture machines and screen, carpets and furnishings for the ladies' dressing room, of a perishable nature, are not fixtures.

SAME. A clause in such a lease requiring the lessee to yield up the premises in a "good tenantable condition" does not contemplate that the building should be furnished for any particular purpose, so as to make such furnishings fixtures.

SAME. The fact that the building was constructed for a particular purpose and specially to receive the very furnishings installed, which were suitable only for this particular building or type of building, does not make the furnishings fixtures.

SAME—LANDLORD AND TENANT—TRADE FIXTURES — INTENT — EVIDENCE. Whether fixtures become part of the freehold or are trade fixtures, removable by the tenant, depends upon the intent of the parties, to be inferred, when not determined by express agreement, from the nature of the article affixed, the relation and situation of the freehold after annexation, the manner and purpose of the annexation, considered in the light of the ordinary rules applicable to landlord and tenant.

SAME — ANNEXATION — PRESUMPTIONS. As between landlord and tenant, the presumption is that the tenant did not intend to enrich the freehold by annexing fixtures.

SAME—LANDLORD AND TENANT—TRADE FIXTURES — ANNEXATION—REMOVAL—EVIDENCE. Opera chairs and a vacuum cleaner, placed in a theater building by a tenant, and purchased under conditional sales

¹Reported in 161 Pac. 478.

contracts, are not fixtures that become part of the freehold, in view of the presumption that they are trade fixtures.

SAME. The same is true of a pipe organ manufactured and installed by the tenant after the building was completed, although to remove it requires the tearing away of parts of partition walls that were taken out in order to receive it, where no material injury to the building would ensue; and the same is true of other fittings the removal of which would work no material injury to the building.

Appeal from a judgment of the superior court for King county, John Kelleher, Esq., judge *pro tempore*, entered December 20, 1915, in favor of the defendant, in an action for an injunction, tried to the court. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellants.

J. W. Albright and Peters & Powell, for respondent.

FULLERTON, J.—The respondent, as the lessee of the appellants, erected a theater building upon a certain lot situated in the city of Seattle, of which the appellants are the owners. The building was erected pursuant to the terms of a written lease, which provided that the building should be of certain standard construction, should cost not less than \$75,000, and should be wholly the property of the owners of the realty. The lease also provided that the premises should be quietly yielded up at the expiration of the lease in a good and tenantable condition in all respects, reasonable wear, damage by fire or unavoidable casualty excepted. The lease was for a term of fifteen years from and after February 1, 1914, with a renewal privilege of five years additional. The rent reserved was two thousand dollars per month.

The respondent completed the building in accordance with its agreement, fitted it up and operated as a moving picture theater until November 1, 1915, a period of some twenty-two months, when it found itself unable to continue the business longer. At that time it notified the appellants that it would quit and surrender the premises, and was proceeding to remove from the building certain furnishings which it conceived

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to be trade fixtures and no part of the freehold, when the present action was begun to restrain it from so doing.

Of the articles over which the contest was waged in the court below, the court found to be trade fixtures and awarded to the respondent the pipe organ, the opera and opera box chairs, the electric sign and frames, certain of the electric fixtures used for lighting the building, the carpets, curtains and draperies, the sign frames, the umbrella lockers, the picture screen, the picture machines, the portable switchboard, the vacuum cleaner, the piano, and the draperies and furniture of the ladies' dressing room.

In the plans for the building, a space was allotted for the pipe organ by the architect in charge, and bids were invited for an instrument that could be accommodated in the space allotted. A bid of a manufacturer was accepted, but the instrument itself did not arrive until after the building had been completed and in use for some time. It came in a knocked-down condition, but it was found that, to get some of the larger pieces into the space provided, certain structural portions of the partition walls of the building had to be removed. There were two such removals, one to admit a portion of the organ proper, and another to admit the organ blower. The parts of the walls removed were replaced after the organ had been put together, and to remove it would again require the removal and replacing of these same parts of the wall.

The opera chairs were not manufactured specially for the building. After the completion of the building, the floors of the main seating room and balcony were marked off into aisles necessary to be established and maintained in virtue of the municipal ordinances, and the remaining spaces measured for the placement of the chairs. These spaces were of varying dimensions, and to properly fit chairs in them, different width of chairs were required. The chairs were selected with reference to spaces and with reference to the color scheme of the building, and the aisle standards were cast ac-

cording to a selected design. The municipal ordinances also require that all such chairs be securely fastened to the floor, and these were fastened by inserting expansion bolts into the concrete floor at proper places to fit into holes in the feet of the chairs; the chairs being fitted over the bolts and fastened with nuts in the usual manner. They can be removed by unscrewing the nuts and lifting the chairs from the bolts. New chairs of the same design from the same manufacturer can be fitted onto the bolts, but perhaps not those of any other manufacturer, as the particulars of the designs are not the same. To remove the chairs would leave the bolts protruding above the floors, but the evidence discloses that these can be removed without injury to the floor, the simplest way being to clip them off even with the concrete floor.

The opera box chairs are not fastened in any way to the building. They were selected, however, with reference to the size of the boxes, and were specially selected so as to comport with the general color scheme of the theater. No difficulty would be experienced in replacing them.

The electric sign and frame is on the front of the building and contains lights so arranged as to spell the words, "The Alaska Theater." It was specially designed for the building, and is supplied with electricity by wires leading from the source of supply through conduits passing through the building. The sign frame can be detached by releasing the wires and removing the screws by which the frame is attached to the building.

The electric light fixtures in question are those used for lighting the inside of the theater building. There are forty-seven of these in all, ten of which are curved to fit the columns on which they are placed, and were specially shaped for that purpose. They are not such fixtures as are usually found in stock. The other thirty-seven, as we understand the record, are the usual stock fixtures. None of them are built into the frame of the building, and all can be removed without injury

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thereto, by merely loosening the fastenings by which they are held in place.

The carpets are tacked down to wooden strips embedded in the concrete floor, and were especially cut to fit the curves and sides of the aisles and floors. The draperies are hung on rings which slide on poles, the poles being fastened to the building with sockets and brackets screwed onto plugs inserted in the walls. The stage curtain does not roll up but parts in the center, and is operated by a motor which sets upon a cushion to which it is made fast with bolts. All are capable of being removed without injury to the building.

The sign frames are brass and copper frames placed in panels on the outside of the building, intended to hold advertising signs. They are held by ordinary fastenings, and are capable of being removed without injury to the building. The umbrella lockers are racks which stand on floor without fastenings.

The picture screen consists of a canvas stretched on a wooden frame, which is hung at the back of the stage on the wall. It is hung on hinges screwed to wooden ledges built into the wall. It is a stock article, and all that is necessary to remove it is to unscrew the hinges from the ledges.

The picture machines are of the Simplex design and rest upon tripods. The tripods were placed in position before the floor of the picture room was completed, and the feet thereof, together with the electric wires which lead to the machine, are imbedded in the floor. The machines are ordinarily portable, and these could be removed with only such damage to the floor as could be easily repaired.

The portable switchboard is in the orchestra pit and is movable for a distance of probably six feet, so made as to be available for either the organist or the pianist, and is for use in controlling the lights and the curtain motor. It can be detached by disconnecting the wires.

The vacuum cleaner is a stock machine, placed in the basement of the building. A concrete foundation was put in on

which was bolted a ten-plate for holding bolts, and the machine was bolted to the ten-plate. Connections were made with the suction pipes leading to the various rooms, and with a discharge pipe leading to a sewer. To remove it requires disconnecting the pipes and releasing it from the ten-plate to which it is bolted. It was not specially designed for the building, although its manufacturer was the only one out of a number of different manufacturers of vacuum cleaners who would install a sewer connection and guarantee its successful operation.

The piano is a standard instrument, and the office furniture and the furniture for the ladies' dressing room with the other furnishings thereon are articles in common use, such as are found among dealers therein generally.

The appellants, while admitting that, between landlord and tenant, as that relation is ordinarily understood, many of the articles enumerated would be property of the tenant and removable by him at the termination of the tenancy, make the contention that the ordinary rules are not applicable to the situation as here disclosed. It points out that the defendant corporation was organized for the sole and only purpose of taking over the lease to the real property, erecting a building thereon, and conducting a theater therein for a fixed period of time; that it was not a case of a theater company doing business first in one building and then in another and removing its trade fixtures from place to place, but was a case of a company organizing for a particular purpose at a particular place, and procuring fixtures in some instances specially, and in all instances generally, designed for the particular building, which was in itself planned in its inception to receive fixtures of this character and none other. It is further pointed out, also, that the tenant is insolvent and does not intend to engage in the theater business elsewhere, and that the controversy is in reality a contest between the appellants and the creditors of the tenant. From this it is argued that it was the intention of the parties to complete

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and equip a theater building suitable for the purpose for which it was intended to be used, and that the claim made now that the articles of furniture placed therein are chattels or trade fixtures subject to be taken by the outgoing tenant is directly antagonistic to this manifest intention.

But we cannot think the tenancy differs in this regard from an ordinary tenancy. The lessee, it will be remembered, contracted to erect on the leased premises a theater building to cost not less than a certain fixed sum of money, and to pay another fixed sum as rental for the property for a fixed period of time. There was no agreement that it should be furnished in any particular manner. Indeed, while it was undoubtedly contemplated by the parties to the lease that the building was to be furnished as a moving picture theater and that such a business would be conducted therein, the terms of the lease would have been complied with by the construction of the building and the payment of the rent, without furnishing it in any manner or putting it to any particular use. Again, many of the enumerated articles are, from their very nature, fragile and shortlived. It would be strange indeed, if the electric sign, the electric fixtures, the opera chairs, the picture machine, the picture screen, the carpets, or the furnishings for the ladies' dressing room, would have been in a usable condition after fifteen years of service. Clearly these articles were so far personal property that they could be removed and replaced by the tenant as the necessities of the case or the demands of the business required, without the consent, let or hindrance of the landlord. The clause in the lease requiring the tenant to quietly yield up the premises at the termination of the lease or sooner termination of the tenancy in a "good and tenantable condition," did not contemplate that the building should then be furnished for any particular purpose. This is a customary clause in all leases, and contemplates the return of the land with its appurtenances that pertain to the realty, not the personal property

or trade fixtures which the tenant introduces for his own special purpose.

Stress is laid on the fact that this building was constructed for a particular purpose, that it was constructed specially to receive the very fixtures the tenant installed in it, and that these were suitable only for this particular building or type of building. But this is true of many buildings other than those built specially for a moving picture business. For example, the lessee of a dwelling house for a term of years would want the furniture and fixtures he placed therein to correspond with the general contour and color scheme of the building; so the lessee of a building to be used as place for the sale of goods, wares and merchandise; and the lessee of a building to be used for manufacturing purposes, would doubtless be controlled to some extent by the form and style of the building when selecting machinery for his purposes; yet it would not be contended in any of such instances that the fact would be a controlling element in determining whether the furnishings or fixtures become a part of the realty. We cannot conclude, therefore, that the rules governing the determination of the question are different in this case from those ordinarily pertaining to landlord and tenant.

It remains, then, to inquire whether the properties in question are fixtures in the sense that they form a part of the realty, or are trade fixtures capable of being removed by the tenant, considering the question in the light of the ordinary rules applicable to landlord and tenant.

In determining whether a chattel which has been annexed to the freehold is a trade fixture or a part of the realty, the cardinal inquiry is into the intent of party making the annexation. Often there is difficulty in determining the intent, but, whatever may be the legal relation of the parties between whom the controversy is waged, when the intent is discovered it is generally controlling. The intent is not to be gathered from testimony of the actual state of the mind of the party making the annexation (*Washington Nat. Bank v. Smith*, 15

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Wash. 160, 45 Pac. 736); but is to be inferred, when not determined by an express agreement, from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made. It is conclusive, of course, that the chattel annexed is a fixture when it cannot be removed without a material injury to the freehold, as, for example, where it is essential to the support of some part of a permanent structure. *Lawton Pressed Brick & Tile Co. v. Ross-Kellar Triple Pressure Brick Mach. Co.*, 38 Okl. 59, 124 Pac. 43, 49 L. R. A. (N. S.) 395. But before this rule will be allowed to govern, it must be shown that the removal will result in a material injury; injuries that are inconsequential, or injuries that can be made whole do not affect the principle.

Again, a different rule obtains for determining the intent when the question arises between landlord and tenant, or licensor and licensee, than obtains when it arises between grantor and grantee, mortgagor and mortgagee, or heir and executor. When the annexation is made by a tenant or licensor the presumption is that he did not intend to enrich the freehold, but intended to reserve title to the chattel annexed in himself, while from an annexation by the owner of the property, the presumption is the other way. *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Dunsmuir v. Port Angeles Gas, W., El. L. & P. Co.*, 30 Wash. 586, 71 Pac. 9; *Lynn v. Waldron*, 38 Wash. 82, 80 Pac. 292; *Welsh v. McDonald*, 64 Wash. 108, 116 Pac. 589; *Cutler v. Keller*, 88 Wash. 334, 153 Pac. 15.

It therefore often happens that the same character of article annexed to the realty in the same way will be held to be a trade fixture and removable when annexed by a tenant, but real property and not removable when annexed by the owner of the property. A good illustration is found among our own cases. In *Welsh v. McDonald*, *supra*, the controversy was between landlord and tenant. It was held

that mill buildings, camp buildings, barns, and outhouses, erected by a tenant on leased land for the purpose of conducting a sawmill business, were removable at the will of the tenant at any time before the expiration of the lease. In the course of the opinion the court said:

"The testimony shows that all these buildings were erected exclusively for the benefit of the milling business which was carried on by the lessors. Many of the small houses were built by the laborers employed by the mill owners, and the laborers were charged by the mill owners for the lumber which was used in the construction of said small houses.

"That articles which are annexed by the tenant for purposes of trade, known as "trade fixtures," are removable by him as against the landlord, has been recognized from an early period in the development of the law of fixtures, the theory being that it is public utility that the tenant should be enabled to improve the property for the purpose of carrying on trade, without thereby forfeiting his improvements.' 1 Tiffany, Modern Law of Real Property, § 240.

"The strict rule of the early common law under which chattels which had been physically annexed to the freehold became the absolute property of the landlord has been gradually and greatly relaxed in favor of tenants. The first exception to this rule was made in the case of trade fixtures so called such as were placed upon the premises by the tenant during the term for the purpose of carrying on trade, commerce, or manufacture. It is now a general rule that whatsoever is affixed, as a trade fixture, to the land or to any building which is on the land during the term whether made of wood, stone, iron or other material, is removable by the tenant at the end of the term. And it is difficult to conceive of any so-called fixture, however solid, permanent and closely attached to the realty which is placed there for the sole purpose of trade which may not be removed by the tenant at the end of his term.' 2 Underhill, Landlord & Tenant, § 736.

"Under this modern rule it has been uniformly held that a building erected upon leased land for the purpose of carrying on the business of the lessee was removable at the will of the lessee, provided it was removed during the term of the lease."

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In the case of *Cutler v. Keller*, *supra*, the controversy was between lien claimants on the one side and mortgagees on the other. The owner had erected a building on the property to which the several liens attached, intending to use the building as a moving picture studio. The building was set upon posts and was capable of being removed without injury to the freehold. It was held that the building was a part of the realty, the court saying:

"As a general rule, structures of a permanent character erected on land by the owner in fee simple are presumed to be built for the purpose of improving the land and to become a part of the realty, in the absence of evidence of a contemporaneous contrary intention. . . .

"When buildings are placed by the absolute owner of land on which they rest, their quality of removability without injury to the freehold is not usually a factor of controlling importance as between mortgagor and mortgagee, *Rowland v. Sworts*, 17 N. Y. Supp. 399, though it may be as between landlord and tenant or licensor and licensee.

"Fully as much importance is attached to the relation of the party making the annexation, to the land and the permanency and habitual character of the annexation, as is paid to the manner or form of the fastening. When the absolute owner of the land, for the better use of his land, erects property upon, or attaches it to the freehold, it will go to his heir, or pass by deed, to his grantee, and the same general rule applies between mortgagor and mortgagee, but as between landlord and tenant and licensor and licensee, this rule is relaxed, with a view to the encouragement of mechanical and agricultural pursuits.' Tiedeman, Real Property (3d ed.), p. 23, § 17."

In the light of these principles, we are clear that the trial court did not err in its judgment. Much of the property would be regarded as personalty no matter by whom installed, since it is in no way attached in such a manner as to hold it in place while in use, but which must be constantly removed for renovation or repair. In this jurisdiction the opera chairs certainly, and the vacuum cleaner probably, would, under our earlier decisions, be regarded as realty and

would pass by a deed from the owner to his grantee, but since they were purchased and put in place by the tenant, most of them under conditional sales contracts, we cannot conclude, under the presumption that prevails in such cases, that they became a part of the realty. All can be removed without material injury to the structure or to themselves.

The pipe organ is not in any way a part of the building. It was manufactured and installed, as we have said, after the building was completed. The right to remove it is denied because to do so requires tearing away certain parts of the partition walls. But all of the evidence is to the effect that these parts were taken out on the installation of the organ and subsequently repaired, and that the organ can be removed by reopening the walls at the same places. The fact that they were once opened and replaced would not perhaps justify a second opening if the building should be materially injured by the act. But the evidence discloses that no material injury to the building will ensue from such an opening, and the fact that it was once made without objection by the owners of the fee is forceful evidence of the immateriality of the injury. The removal of the other articles which are attached to the building will not, as is shown from our review of their nature and the manner in which they are attached, work material injury to the building. Their removal will require some repairing to make the building again a completed whole. The trial court met this by requiring that the tenant give a bond in the penal sum of \$1,000, conditioned that it will repair and make good any and all damage which shall be caused the building by the removal of the property. It is not questioned that this sum is sufficient to meet the incidental damage the removal of the property will cause.

The judgment is affirmed.

MORRIS, C. J., MOUNT, CHADWICK, and ELLIS, JJ., concur.

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[No. 13477. Department One. December 12, 1916.]

HENRY F. SUKSDORF, *Appellant*, v. F. W. SUKSDORF,
Respondent.¹

ARBITRATION AND AWARD—AGREEMENT—VALIDITY—STATUTES. Under Rem. 1915 Code, § 421, providing that an agreement to arbitrate shall be in writing, signed by the parties, and may be by bond in any sum, conditioned to abide the award, an agreement to arbitrate need not contain an express provision to "abide the award"; as that applies only to an arbitration by bond, and is implied.

SAME—COMMON LAW ARBITRATION—STATUTES. Common law arbitrations are entirely supplanted in this state by Rem. 1915 Code, §§ 420-430.

SAME—REQUISITES—PROCEEDINGS—WAIVER OF OBJECTIONS. Where both parties moved for judgment upon an arbitration, after a hearing; without objection to the agreement, the court acquired jurisdiction to confirm the award, and it is too late to object that the submission was insufficient in failing to agree to abide the award.

Appeal from an order of the superior court for Spokane county, Blake, J., entered August 11, 1915, vacating a judgment upon an arbitration and award, after a hearing before the court. Reversed.

W. C. Jones and *Geo. W. Belt*, for appellant.

Davis & Heil, for respondent.

FULLERTON, J.—On March 23, 1915, Henry F. Suksdorf and F. W. Suksdorf, for the purpose of settling various controversies between them which extended over a number of years, entered into the following written arbitration agreement:

"This Agreement made and entered into between Henry F. Suksdorf, plaintiff herein, and F. W. Suksdorf, defendant herein, Witnesseth:

"That whereas a controversy has arisen and existed between plaintiff and defendant for many years, arising out of an accounting for 8,000 bushels of wheat received by defend-

¹Reported in 161 Pac. 465.

ant for plaintiff about twenty years ago and out of the right to purchase certain land near Spokane Bridge and near Spangle, about 500 acres, which plaintiff claims to have procured for defendant, and out of a promissory note of defendant for \$1,800 to plaintiff, on which plaintiff claims that but \$1,450 and interest has been paid, and it being admitted that defendant claims various credits for payments made, also for the value of services rendered plaintiff, and whereas defendant also claims other defenses and whereas said parties have been unable to agree as to the respective amounts for which each is entitled to credit and also disagree as to the validity of several of the claims and counterclaims and credits aforesaid.

"Now, therefore, The said parties do hereby agree to submit their differences as aforesaid, and all others since 1884 to the award of Thomas Conlan, W. C. Gray and Henry Rohwer, mutually selected by them for the purpose of arbitration.

"It is further agreed that the parties hereto waive the benefit or defense of the statute of limitations."

A majority of the arbitrators found that F. W. Suksdorf was indebted to H. F. Suksdorf in the sum of \$2,500. The award was filed with the clerk of the superior court of Spokane county and motion made before the court for its confirmation. Over the exception of F. W. Suksdorf, the award was confirmed and judgment rendered in favor of H. F. Suksdorf for the amount found due by the award. Thereafter F. W. Suksdorf filed a motion to vacate the judgment and order affirming the award, which motion was granted by the court "for the reason that the agreement to arbitrate contained no express stipulation that the parties thereto would abide by or perform the award." From the order vacating the judgment on the award, H. F. Suksdorf prosecutes this appeal.

The court based its order vacating the confirmation of the award on the theory that, under Rem. 1915 Code, §§ 420-430, providing a statutory method for arbitration and award, it was necessary for the parties to agree to "abide the award,"

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in order to give the superior court jurisdiction to enter judgment upon an award without suit thereon. The only support for this position is found in Id., § 421, which provides:

"Said agreement to arbitrate shall be in writing, signed by the parties, and may be by bond in any sum, conditioned that the parties entering into said submission shall abide the award."

To uphold the decision of the superior court it would be necessary to construe the foregoing section to mean that the arbitration agreement should be conditioned in terms that the parties should abide the award. We think the clause "conditioned that the parties entering into said submission shall abide the award," applies solely to an arbitration "by bond" mentioned in the statute, and relates to the conditions of the bond, not to the agreement to arbitrate. Moreover, a specific agreement to abide the award is unnecessary in matters of arbitration if the statute does not expressly require it.

"The law implies an agreement to abide the result of an arbitration from the fact of submission." *Smith v. Morse*, 9 Wall. (U. S.) 76.

See, also, *Kingsley v. Bill*, 9 Mass. 198; *Pierce v. Kirby*, 21 Wis. 126; *Valentine v. Valentine*, 2 Barb. Ch. 430; *Robinson v. Templar Lodge, No. 17, I. O. O. F.*, 97 Cal. 62, 31 Pac. 609. It is true that, in the case of *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31, 67 Pac. 374, we said:

"Section 5103 [Bal. Code, which is the same as § 421; Rem. 1915 Code] provides that the agreement shall be in writing, signed by the parties, and conditioned that the parties entering into the agreement shall abide the award."

But the question was not an issue in that case and, while appropriate enough to the particular question, was not intended to lay down a general rule.

The respondent further contends that, in the event this court construes § 421 as not imposing the necessity of a re-

cital that the parties will abide the award, the arbitration agreement falls under the common law rather than the statutory regulations for the submission of the controversy, since the agreement nowhere discloses that it is the intent of the parties to follow the statutory procedure.

This contention is based on the assumption that both the common law and statutory method of arbitration and award are existent in this state. But this court has ruled in a recent case that common law arbitrations have been entirely supplanted by our statutory regulations on the subject. See *Dickie Mfg. Co. v. Sound Construction & Engineering Co.*, 92 Wash. 316, 159 Pac. 129. Possibly it might follow from this that, if the submission was insufficient under the statute the entire proceedings would be a nullity; but, as we have indicated, we cannot conclude that this agreement was thus insufficient. According to the trial court's own view, it was deficient only because it did not contain an agreement to abide the award. This, as we say, is not enough on which to base a holding of insufficiency. Moreover, no claim of insufficiency was made when the appellant moved for judgment thereon; in fact, both parties to the agreement treated the matter throughout as a statutory arbitration until after judgment was rendered. Mere defects in the proceedings could not avail after that time. There must have been some such radical departure from the prescribed proceedings as to show want of jurisdiction in the court to render the judgment. There was no such departure here.

The court having properly acquired jurisdiction, its judgment was a final one, which could be vacated only in the manner and on the grounds prescribed by law for the vacation of judgments.

Reversed, with directions to reinstate the judgment.

MORRIS, C. J., MOUNT, and CHADWICK, JJ., concur.

ELLIS, J., concurs in the result.

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Opinion Per HOLCOMB, J.

[No. 13552. Department Two. December 12, 1916.]

SCANDINAVIAN AMERICAN BANK OF TACOMA, *Appellant*, v.
PIERCE COUNTY *et al.*, *Respondents*.¹

TAXATION—BANKS—REALTY — DEDUCTIONS — EVIDENCE. In a proceeding by a bank to secure a deduction from its taxes of the value of certain real estate, an exhibit attached to the complaint showing certain dates preceding the description of each tract, warrants the conclusion, in the absence of any explanation, that the dates shown were the dates of the acquisition of the property.

SAME—BANKS—VALUATION—REALTY—DEDUCTIONS—STATUTES. It being unlawful, under Rem. & Bal. Code, § 3330, for a bank to carry real estate on its books longer than three years, the value of such real estate cannot be considered and deducted from the value of its capital stock, in fixing its assessment for taxation pursuant to Rem. 1915 Code, § 9134, and a bank seeking a deduction must allege and prove the status of the realty.

SAME—BANKS—REALTY—DEDUCTIONS—VALUATION. Where the assessor accepted, without explanation, the exact figure of \$229,977.28, turned in by the bank officials as the value of the bank's capital stock, surplus, and undivided profits, and the bank officials testified that such sum included \$150,000 expended on its real estate and bank building, it follows that the sum expended was taken as the value of the real property, and under Rem. 1915 Code, § 9134, sixty per cent of the amount, or \$90,000 is to be deducted as the value of the land, in determining the value of the bank's capital stock, surplus and undivided profits, for the purposes of taxation.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered December 24, 1915, in favor of the defendants, in an action to enjoin the collection of a tax, tried to the court. Modified.

Williamson, Williamson & Freeman, for appellant.

Fred G. Remann, Harry E. Phelps, and H. G. Fitch, for respondents.

HOLCOMB, J.—Appellant, a domestic banking corporation, feeling itself aggrieved at the action of the assessor of Pierce county in failing to deduct the value of certain real estate

¹Reported in 161 Pac. 469.

owned by it from the value of its capital stock, surplus and undivided profits, for the purposes of taxation, in the assessment of March 1, 1913, brought this action against Pierce county and the treasurer thereof to restrain the enforcement of the tax, and to compel the treasurer to accept as full payment of the tax an amount which would be correct if the value of all the real estate were deducted in conformity with appellant's claim. The trial court ordered the assessed value of a portion of the tracts of real estate, amounting to \$45,957, deducted, and entered its decree accordingly, from which decree appellant has appealed.

Appellant first assigns as error the action of the trial court in refusing to deduct the value of certain of the tracts of real estate as provided for in Rem. 1915 Code, § 9134, because it was shown by the pleadings that the date of acquisition was more than three years prior to March 1, 1913, it being unlawful for a bank to carry real estate on its books as an asset for a longer period than three years, under statute Rem. & Bal. Code, § 3380; and also the court's refusal to deduct the value of other parcels of real estate because the dates of acquisition thereof were neither pleaded nor proved, the court being of the opinion that the burden of proof was on appellant to establish such facts before it could prevail.

Appellant contends that, having alleged and proved that it owned this property on March 1, 1913, by virtue of Rem. 1915 Code, § 9134, which provides that the proportionate part of the assessed value of the real estate belonging to the bank shall be deducted, it has established a *prima facie* case, and it is therefore incumbent on respondents to show, as a matter of defense, that the property has been held by appellant for a longer period than three years. In arriving at the foregoing conclusions, the trial court construed certain dates indicated in an exhibit attached to and made part of appellant's complaint, preceding the description of each tract of real estate, as the dates of acquisition thereof by the bank, which construction is now complained of by appellant. Since

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there is nothing in the record to enlighten us on the exact office of these dates, and as the dates of acquisition would be material to the issues in this case, it seems improbable that they were placed there for any other purpose than to indicate the dates of acquisition of the various parcels, which leads us to the conclusion that the construction of the trial court is correct.

Since, then, it was unlawful for banks to carry real estate on their books for a longer period than three years (Rem. & Bal. Code, § 3330), the value of such real estate could not be considered in determining the value of the capital stock, and hence could not be deducted from the value of the capital stock. Regardless of the status of the title to property held by a bank longer than three years, it is made unlawful by statute to do so, and appellant cannot reap the benefits of Rem. 1915 Code, § 9134, by a continuing violation of the law. As appellant is seeking by this action to have the assessed value of this property deducted, it must allege and prove that the status of this property was such that it should be deducted by virtue of the statutes. As this was not done, we find no error in the trial court's ruling on the question.

Included in this list of property, the assessed value of which appellant claims should have been deducted, was a tract of property which the bank used as its place of business, hereinafter called the bank property. The action of the trial court in allowing a deduction of only \$30,000 by reason of the bank's ownership of this property is also assigned as error. This property was appraised at \$200,000, and a sixty per cent basis was then used in Pierce county to fix the assessed value for taxation, making the assessed value thereof \$120,000, at which it was thereupon assessed separately as real estate according to law. As this property was incumbered by a mortgage of \$150,000, the assessor, conceiving the idea that appellant was entitled only to a deduction of its equity in the property over and above the amount

of the mortgage, instead of deducting the assessed value (\$120,000) from the value of the capital stock, surplus and undivided profits, first subtracted from the assessed value the sum of \$90,000, which was sixty per cent of the \$150,000 mortgage, leaving a balance of \$30,000, the deduction of which is complained of by appellant. After appellant had acquired this bank property, it expended the sum of \$150,000 over and above the mortgage in rendering the premises suitable for its business, and therefore asserts that sixty per cent of this \$150,000 invested in the premises, or \$90,000, should have been deducted from the value of the capital stock, undivided profits and surplus, instead of the \$30,000 deduction as made by the assessor. It is interesting to note that appellant is not claiming a deduction of the assessed value of the property as real estate.

This court held, in *Scandinavian American Bank of Tacoma v. Pierce County*, 85 Wash. 348, 148 Pac. 18, that Rem. 1915 Code, § 9134, contemplates that only that portion of the real estate which entered into the value of the capital stock should be deducted. The converse would also be true, that all the value of the real estate which was considered in determining the value of the capital stock and surplus should be deducted, provided that the value to be deducted does not exceed the assessed value of the property. As to what value this bank property was given in ascertaining the value of the capital stock, surplus and undivided profits, at \$229,977.28, the record is not clear, but Pringle, manager of appellant, testified that the \$150,000 expended by appellant on this property entered into and became a part of the \$229,977.28, which figures were turned in by appellant to the assessor. This testimony was corroborated by one Hayden, a former deputy state bank examiner. It is true that the assessor denied this testimony, but the fact remains that he accepted the exact figure of \$229,977.28 as received by him from appellant, and offered no explanation as to how he ascertained that amount nor what value he placed upon the bank prop-

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erty in so ascertaining it. From these facts, it seems apparent that the \$150,000 expended by appellant on this property was taken as the value of the property in determining the value of the surplus, capital stock, and undivided profits.

In determining the amount that should be deducted on account of appellant's ownership of this bank property, there are two tests that must be followed, viz.: (1) In no event can more than the assessed value of the property be deducted, which in this case was \$120,000, as that is the limit authorized by Rem. 1915 Code, § 9134; (2) nor can a greater amount be deducted by reason of a bank's ownership of property than the value that such property was considered to have in determining the value of the capital stock, surplus and undivided profits. As \$150,000 was considered the value of this property in ascertaining the value of the capital stock, surplus and undivided profits, no more than sixty per cent of that amount, or \$90,000, could be deducted or it would violate test No. 2, as stated above. It is apparent, therefore, that a deduction of \$90,000 is proper, as it violates neither of these tests, since it is a lesser amount than the assessed value of the property as real estate and it is sixty per cent of the value the land was given in determining the value of the capital stock, surplus and undivided profits. Not to allow such deduction would amount to double taxation, for it would be taxed once as realty and once as personal property included in the capital stock, surplus and undivided profits. We do not wish to be understood as holding that, in all cases, the true amount of deduction is measured by the amount invested by appellant in the property, but rather that the amount invested should be deducted where it is the amount used in determining the value of the capital stock, surplus and undivided profits, and where such amount is either equal to or less than the assessed value of the property.

The decree of the trial court is therefore modified by deducting from the assessed valuation of the capital stock, sur-

plus and undivided profits \$90,000 instead of \$30,000, and in all other respects it is affirmed. Appellant will recover costs.

MORRIS, C. J., MOUNT, FULLERTON, and PARKER, JJ.,
concur.

[No. 13649. Department One. December 12, 1916.]

THE STATE OF WASHINGTON, *on the Relation of P. E. Hall,
Junior, Plaintiff*, v. C. V. SAVIDGE, *as Commissioner
of Public Lands, Respondent*.¹

MINES AND MINERALS—LEASE—RIGHT TO LEASE—COMMISSIONER OF PUBLIC LANDS—POWERS. Rem. 1915 Code, § 6791, providing for the leasing of state lands for the purpose of mining and extraction of petroleum and gas, leaves no discretion in the commissioner of public lands where a qualified person has complied with the provisions of the statute.

SAME—LEASE—POWERS OF COMMISSIONER—"LANDS BELONGING TO STATE." Rem. 1915 Code, § 6791, providing for the leasing of "any land belonging to the state" for the purpose of mining and extraction of petroleum and gas, applies to lands which have been sold by the state, under Id., § 6675, reserving to the state all oils, gases, and minerals and the right to enter for the purpose of taking the same.

SAME—LEASE—RIGHT TO LEASE—CONDITIONS PRECEDENT. Under Rem. 1915 Code, § 6675, reserving to the state, its successors and assigns, all oils, gases and minerals on lands sold by the state, with the right to enter for the purpose of taking the same, with the proviso that the state's reserved rights shall not be exercised until provision has been made by the state, its successors or assigns, to pay to the owner of the land full damages sustained by reason of the entry, an applicant of an oil lease of state lands must show that provision has been made to pay to a contracting purchaser from the state the damages that he will sustain by reason of the entry, as such person is the "owner" within the meaning of the act.

Application filed in the supreme court August 29, 1916, for a writ of mandamus to compel the state land commissioner to issue a lease for the mining of oils and gases on state lands. Denied.

¹Reported in 161 Pac. 471.

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Opinion Per FULLERTON, J.

Lee C. Delle, for plaintiff.

The Attorney General and *R. E. Campbell*, *Assistant*, for respondent.

FULLERTON, J.—This is an original application for a writ of mandamus. It is before us on the petition of the relator for the writ and the demurrer thereto by the respondent.

In substance, the petition recites the following facts: On April 2, 1910, the state, being then the owner of a certain section of land situated in Benton county, entered into a contract, in the manner provided by statute, for the sale of the same to one S. W. Macy, reserving to itself, its successors and assigns forever, all oils and gases in such land contained, together with the right to enter on the same or any part thereof for the purposes of exploring for oils and gases thereon and developing and working such mines as might be found, which contract has at all times since the same was entered into been kept in full force and effect. The land is situate in an arid region of the state, is unproductive in its natural state, is covered with a native growth of sage brush, is incapable of raising any form of crop whatsoever without irrigation, is not irrigated, and is not situate under any irrigation canal or system from which it can be irrigated. Prior to July 12, 1916, the applicant discovered on a certain described quarter section of such land valuable petroleum oils and gases in paying quantities, and on the day named applied to the defendant, who is the duly elected and acting land commissioner of the state of Washington and the officer of the state who is vested with power to lease state lands for the purpose of mining for oils and gases, for a lease of the quarter section for that purpose, tendering to the defendant all of the costs and charges provided by statute as a condition precedent to procuring such a lease. The lease was refused by the defendant, and the prayer of the petition is for a peremptory writ commanding him to enter into it.

The statute in force at the time the contract with Macy was entered into (Rem. 1915 Code, § 6675) contains the following provisions:

"All state lands shall be sold on the following terms: One-tenth to be paid on the date of sale and one-tenth to be paid one year from the date of issuance of the contract of sale and one-tenth annually thereafter until the full purchase price has been paid. . . . Provided, further, that each and every contract for the sale of any state lands, or deeds or patents to such state lands except deeds or patents issued pursuant to contracts heretofore made shall contain the following saving clause: 'The party of the first part hereby expressly saves, excepts and reserves out of the grant hereby made, unto itself, its successors, and assigns forever, all oils, gases, coal, ores, minerals, and fossils; . . . and it also hereby expressly saves and reserves out of the grant hereby made, unto itself, its successors and assigns forever, the right to enter by itself, its agents, attorneys and servants upon said lands or any part or parts thereof, at any and all times, for the purpose of opening, developing and working mines thereon, and taking out and removing therefrom all such oils, gases, coal, ores, minerals and fossils, and to that end it further expressly reserves out of the grant hereby made, unto itself, its successors and assigns forever, the right by its or their agents, servants and attorneys at any and all times to erect, construct, maintain and use all such buildings, machinery, roads and railroads, sink such shafts, remove such soil, and to remain on said lands or any part thereof for the business of mining and to occupy as much of said lands as may be necessary or convenient for the successful prosecution of such mining business hereby expressly reserving to itself, its successors and assigns, as aforesaid, generally, all rights and powers in, to, and over said land, whether herein expressed or not, reasonably necessary or convenient to render beneficial and efficient the complete enjoyment of the property and rights hereby expressly reserved'; Provided, further, that no rights shall be exercised under this reservation by the state, its successors or assigns, until provision has been made by the state, its successors or assigns to pay to the owner of the land upon which the rights herein reserved to the state, its successors or assigns or sought to be exercised, full pay-

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ment for all damages sustained by said owner, by reason of entering upon said land."

The section of the statute relating to leases of land containing petroleum and natural gases (Rem. 1915 Code, § 6791) reads as follows:

"The commissioner of public lands of the state of Washington is hereby authorized to execute leases and contracts for the mining and extraction of petroleum and natural gas from any land belonging to the state or from any lands in which the state may hereafter acquire title, subject to the conditions hereinafter provided."

In *State ex rel. Pindall v. Ross*, 55 Wash. 242, 104 Pac. 216, we held, when construing the statute with reference to the leasing of state lands for mining purposes, that the land commissioner was without discretion with regard thereto, but that he must lease on application of a person qualified to take who fully complies with the provisions of the statute. The same rule applies to the present statute, and the applicant is entitled to a lease of the lands here in question if they are the subject of lease and the applicant has fully complied with the statutes relating thereto.

It is the contention of the *Attorney General*, representing the land commissioner, that the lands are not subject to lease for the purposes for which they are sought, for two reasons; first, because the statutes relating to leases for mining purposes apply only to unencumbered lands of the state, and that these lands are not unencumbered; and second, because there has been no compliance with the last proviso of the section first quoted, in that no provision has been made to pay to the owner of the land upon which the rights are sought to be exercised the damages that will be sustained by the owner by reason of entering upon the land.

The first of these objections cannot, in our opinion, be sustained. It is true that the statute authorizing the lease of lands for mining and for the extraction of petroleum and nat-

ural gases uses the expression "land belonging to the state" in describing the lands subject to the lease, yet we think it includes lands the title to which stands in the condition of the lands here in question. The language employed is general. The statute was intended to be operative. The legislature has not authorized the state itself to engage in the business of mining and, if it may not lease these reserved rights, it must follow that no means exist by which such rights may be made available to the state. While the language is perhaps not the most happy that could be employed to express the idea, we are constrained to conclude that these reserved rights are subject to lease.

We are clear, however, that the application was properly denied on the second ground stated. It will be observed that it is expressly provided in the second of the provisos in the first section quoted that no rights shall be exercised under the reservation, either by the state or its successors or assigns, until provision has been made for the payment to the owner of the land of all damages which he will sustain by reason of entering upon such land. This is a condition precedent to any action in the premises, and includes the entering into of the lease as well as the act of entering upon the property for exploring or mining purposes. Since it is conceded that these damages have not been ascertained or paid, the land commissioner acted within his authority in refusing to enter into the lease.

We have not overlooked the argument to the effect that a person holding a contract to purchase is not an owner, and that, in this particular instance, the purchaser will not be damaged because of the valueless character of the land for the purposes for which he is permitted to use it. But we have no hesitancy in saying that the contracting purchaser is an owner within the meaning of the statute, and whether or not the land is valuable for his purposes is a question on which he has a right to be heard in a court of competent jurisdic-

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tion; he is not obligated to appear and contest the question before the land commissioner.

The application for the writ is denied.

MORRIS, C. J., MOUNT, and PARKER, JJ., concur.

[No. 13358. Department Two. December 15, 1916.]

R. N. SMITH, *Respondent*, v. P. A. HARRINGTON *et al.*,
Appellants.¹

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. It is not reversible error to refuse requested instructions that are merely a specific elaboration of more general instructions referring to the issues to be determined, where, upon the whole, the case was fairly submitted to the jury.

Appeal from a judgment of the superior court for King county, Tallman, J., entered September 8, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Van Dyke & Thomas, for appellants.

Victor M. Place, Benjamin M. Levine, and Philip Tindall, for respondent.

PER CURIAM.—Suit upon two causes of action growing out of a written contract for the furnishing of labor and material in the construction of a concrete warehouse. Verdict for plaintiff.

The case presents questions of fact only, properly triable before a jury. No suggestion is made of any improper admission or rejection of evidence, nor is complaint made as to the instructions given. Appellants content themselves with a claim of error in the refusal of the lower court to give certain requested instructions.

After examining the issues, the evidence, and the instructions given, we conclude that the case was properly submitted

¹Reported in 161 Pac. 465.

to the jury. The requested instructions are a specific elaboration of what the court said to the jury in a more general way in referring to the issues to be determined. We cannot say that the refusal to give them entitles the appellants to a new trial. Upon the whole, we conclude that the case was fairly submitted to the jury, and the judgment should be affirmed.

[No. 13228. Department One. December 26, 1916.]

I. DORNBERG, *Respondent*, v. BLACK CARBON COAL
COMPANY, *Appellant*.¹

INTEREST—ALLOWANCE—UNLIQUIDATED CLAIMS—OPEN ACCOUNT. An unliquidated demand upon an open account for advances made in the nature of loans, draws interest where the amount can be ascertained by a mere computation; and the claim should be treated as liquidated from the time when its certainty is ascertainable.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 8, 1915, upon findings in favor of the plaintiff, in an action on an account, tried to the court. Affirmed.

Danson, Williams & Danson, Robertson & Miller, and Edward W. Robertson, for appellant.

Voorhees & Canfield and Skuse & Morrill, for respondent.

MORRIS, C. J.—Respondent, the treasurer of appellant company, brought this action to recover upon an open account for money advances to the corporation at different times and used by it in payment of various claims against it. The respondent alleged that these advancements were made under an agreement to repay the sums advanced, with interest from the date of such advancements. The lower court credited respondent with the various sums advanced by him and charged him with the amounts received by him, allowing

¹Reported in 161 Pac. 845.

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Opinion Per MORRIS, C. J.

interest on both debit and credit items from the respective dates of receipt. The balance in favor of respondent represents the amount of the judgment awarded him.

It was also found that the appellant agreed to repay respondent all advancements made by him, with interest, when the mine was sold, and that a reasonable time having elapsed since such promise was made, the account is now due, although the mine still remains unsold.

The sole question presented upon the appeal is the allowance of interest to respondent upon the sums advanced by him to the corporation from the time such advancements were made. Irrespective of the finding of the lower court as to the agreement to pay interest, which was made upon conflicting testimony, and which would of itself sustain the judgment, we think the error alleged as to the award of interest is without merit. Whatever may be the rule in other states, it is now well settled in this state that interest is allowable upon an unliquidated claim when the amount thereof can be ascertained by mere computation, and that the claim should be treated as liquidated from the time when its certainty is so determinable. *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381; *Modern Irrigation & Land Co. v. Neely*, 81 Wash. 38, 142 Pac. 458; *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837; *Angeles Brewing & Malting Co. v. Carter*, 89 Wash. 335, 154 Pac. 601.

Here there was no difficulty in determining when these various advances were made nor the amount thereof. Each advancement was in the nature of a loan to the company, made at a specific date, for a specific purpose. The principle of the above cases is controlling upon the facts here involved, and the judgment is affirmed.

MOUNT, CHADWICK, ELLIS, and FULLERTON, JJ., concur.

[No. 13392. Department Two. December 26, 1916.]

A. J. WENDLER, *as Administrator etc.*, Respondent, v.

EVERETT WOODARD *et al.*, Appellants.¹

EXECUTORS AND ADMINISTRATORS—ACTIONS—REAL ESTATE—RIGHT TO SUE—QUIETING TITLE. The administrator may sue to quiet title to water for irrigating the lands of the estate and for injunctive relief, notwithstanding Rem. Code, §§ 1341-1366 vest title in the heirs immediately upon the death of the ancestor; since the administrator has the right of possession.

WATERS AND WATER COURSES—IRRIGATION — LEASED LANDS — ACTIONS—LANDLORD AND TENANT. In an action to enjoin interference with water rights for irrigation, it is immaterial that the lands were under lease, since either the owner or tenant could enjoin interference with possessory rights.

SAME—IRRIGATION—PRESCRIPTIVE RIGHTS—ABANDONMENT. Whether an irrigation ditch was abandoned by changes made with permission is a question of fact and intention.

SAME — PRESCRIPTIVE RIGHTS — RIGHT OF WAY — ADVERSE USE — CLAIM OF RIGHT—PRESUMPTION. Continuous, actual and open possession of water flowing in a ditch across railroad lands, for the requisite statutory period, is presumed to be under a claim of right, so as to ripen into title to the right of way by prescription, although there may have been immaterial changes in the use of the easement.

SAME—APPROPRIATION—PUBLIC LANDS — EVIDENCE — SUFFICIENCY. That land within the public domain was vacant, unimproved and unoccupied, at the time of the appropriation of water from a stream, is some evidence that it was unappropriated government land, within 7 Fed. Stat. Ann. 1091, confirming the title to the water upon public lands actually appropriated and put to a beneficial use; and is sufficient where there was no controverting evidence or inference.

SAME—ACTIONS—DECREE—EQUITY. Where plaintiff, in his pleadings, only claimed 200 cubic inches of water per second of time, out of a flow of 1,500 cubic inches flowing in a ditch, defendant, under a denial of the right to the water and easement, brings himself within the domain of equity; and it is inequitable and error to enjoin any interference with the water in the ditch, thereby preventing the beneficial use of water not belonging to the plaintiff; but the decree should specifically establish the plaintiff's right to 200 inches and to the easement in the ditch to that extent.

¹Reported in 161 Pac. 1043.

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Opinion Per HOLCOMB, J.

Appeal from a judgment of the superior court for Stevens county, Jackson, J., entered September 11, 1914, in favor of the plaintiff, in an action to quiet title to waters for irrigation, tried to the court. Modified.

Hibschman, Dill & White and *Albert I. Kulzer*, for appellants.

L. C. Jesseph, for respondent.

HOLCOMB, J.—Issue was joined in this cause by admissions and denials in the answers of the several defendants to the amended complaint of respondent alleging sufficient facts and praying that he be decreed title, to the extent of 200 cubic inches of water per second of time, to the waters flowing in a nonnavigable stream called Cottonwood creek, by right of prior appropriation thereof, and the title and right to the ditch or waterway through which he had conveyed the water from the place of diversion upon the lands now owned and occupied by some of the defendants, and over, upon, and across the lands now owned by others of the defendants to the lands now owned by the estate and heirs of respondent's intestate, and for temporary and permanent injunctive relief. After a trial of the facts by the court, decree was entered in conformity with the prayer of the amended complaint.

I. The first question to be determined is raised by appellants' demurrer to the amended complaint, which was overruled, (1) that the plaintiff has no legal capacity to sue; (2) that there is a defect of parties plaintiff; (3) that the complaint is insufficient in facts. The first two grounds are urged relying upon the statute (Rem. Code, §§ 1341-1366), vesting title to real estate and hereditaments in the heirs immediately upon the death of the ancestor.

While it is true that the heirs take title immediately, the administrator has the right of possession and the concomitant right to recover possession for the estate. *Gibson v. Slater*,

42 Wash. 347, 84 Pac. 648; *Smith v. Stiles*, 68 Wash. 345, 123 Pac. 448. This would include the right to any and all auxiliary and immediate and permanent equitable relief. The claim that, in any event, the lands of the estate of Wendler being under a lease for years, the lessee only could enjoin interference with any of his demised possessory rights, is also untenable. *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28, does not limit the right to such remedy to the lessee only, but holds that either the owner or the tenant could enjoin such interference. *Jones, Landlord & Tenant*, § 644; 24 Cyc. 930. The demurrer was properly overruled.

II. It is asserted upon the facts that no relief should be granted against appellants. In order to understand the matter, a brief statement is necessary. In 1886 or 1887, one Stephen H. Champ, having previously made settlement upon the northwest quarter of section 7, township 31 north, range 41 E., W. M., in Stevens county, commenced the construction of an irrigation ditch from Cottonwood creek. On June 1, 1887, he located 200 inches of water of Cottonwood creek by posting at the point of diversion his notice of appropriation, and on June 3, 1887, he recorded his appropriation notice in the office of the county auditor. The intake and place of diversion of the water was located on the south bank of the creek in the northwest quarter of the northwest quarter of section 8, township 31 north, range 41 E., W. M., in Stevens county, and was constructed thence in a westerly and southwesterly direction over and across a portion of the forty in which the water was diverted, and across the northeast quarter of the northeast quarter and the northwest quarter of the northeast quarter of section 7, and thence to the northwest quarter of section 7, which had been settled upon and claimed by Champ. At the time of his appropriation and diversion of the water, the northwest quarter of section 8, in which the appropriation was made, was vacant, open, unsettled, and apparently unappropriated government domain. These lands were within the land grant of the United

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States to the Northern Pacific Railroad Company, but the land in the odd numbered section 7 settled on by Champ—the northwest quarter—passed to him from the government and never passed to the Northern Pacific Railroad Company. The other lands in section 7 across which his irrigation ditch was built afterwards passed to the Northern Pacific Railroad Company. In 1899, Champ sold his land to another, and it was afterwards transferred to another, who, in 1901, sold and transferred it to Gustav Wendler, respondent's intestate. In 1886 or 1887, the exact date being uncertain, the ditch had been constructed and water was flowing through it from the place of intake to the Champ land. In 1895, the ditch was still in use, and the water flowing in it was used by Champ for irrigation and household purposes and for watering stock. It was so used as long as Champ lived on the place, until 1899. From the time the Wendlers occupied the place in 1901 until the fall of 1913, they used the water flowing in the irrigation ditch for the same purposes as those above mentioned, except one year, 1911, when they, with the consent of the owners of the land where situated, turned the ditch further south for sawmill purposes. The ditch as constructed by Champ and as used by the subsequent purchasers of the land was eighteen to twenty inches in width and probably six or eight inches in depth, and the exact amount of water flowing through it was never measured during the time they used it. They used it to irrigate somewhere between five and ten acres, though it was possible to irrigate about twenty acres more. During the twelve or thirteen years that Champ occupied the land for which the water was appropriated, no objection seems to have been made by any of the present defendants or their predecessors in interest to his use of the water flowing in the ditch and to his right to the waterway, and none seems to have been made as against Champ's successors to the same use and enjoyment, until about July, 1913, when appellants constructed a dam and irrigation ditch and prevented water from flowing down to the Wendler land.

Five propositions are advanced by appellants why no relief should be granted the respondent: (1) That Champ had no title to any right of way for a ditch by appropriation; (2) that the heirs of Wendler had no title to any ditch by adverse possession; (3) that the old ditch was abandoned; (4) that changes were made without permission; (5) that no rights had been proved in the water and there can be none in the ditch.

The third and fourth propositions are easily disposed of, being simply questions of fact upon which there was some conflict of evidence, the court finding in favor of respondent upon competent evidence. Whether the old ditch was abandoned is purely a question of fact and intent. *Porter v. International Bridge Co.*, 200 N. Y. 234, 93 N. E. 716, 21 Ann. Cas. 684. It is true, changes were made in the original line of the ditch, but it appears that these were made with permission. It is claimed by appellants that the permission was given conditionally and with qualification, and respondent to the contrary. It was a question of fact, however, and the court decided that question in favor of respondent. The evidence not preponderating the other way, we will not overturn it.

The first proposition, that Champ had no title to any right of way for a ditch by appropriation, was dependent upon the fact of whether or not the land over which the ditch extended was, at the time of its appropriation, vacant and unappropriated public land. The land in section 7, other than that acquired by him, was not. It had been appropriated for railroad purposes to the Northern Pacific Railroad Company, although it had not been perfected in the Northern Pacific Railroad Company by the filing of its map of definite location. It was, however, appropriated. As to that land, the claim of the respondent is that the estate of Wendler has title by adverse possession.

"The prevailing rule is that where the claimant has shown an open, visible, continuous, and unmolested use of land for

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the period of time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right, so as to place upon the owner of the servient estate, in order to avoid the acquisition of an easement by prescription, the burden of rebutting this presumption by showing that the use was permissive." 9 R. C. L. 781.

See, also, *Lechman v. Mills*, 46 Wash. 624, 91 Pac. 11, 13 L. R. A. (N. S.) 990.

Immaterial changes or variations in the use of the easement do not destroy its identity. 9 R. C. L. 776.

We think that, under the facts in this case, there being nothing in the record to rebut the presumption of the continuous and uninterrupted, actual, and open possession of the waterway by Champ and his successors in interest across the lands in section 7 owned by some of the appellants, for more than the requisite statutory period, title by adverse possession was established.

As to the land in section 8, which, for all that appears to the contrary, was open and unappropriated public land, before there could be any title to the right of way across that land it was necessary to appropriate lawfully and to acquire a definite quantity of water. That right of way was acquired, if at all, by appropriation. 7 Fed. Stats. Ann. 1091 (U. S. Comp. St. 1913, § 4647). As the court below aptly observed, the evidence is very meager that the land in section 8, where the water was appropriated, was unappropriated. The only evidence there was in any way bearing on that matter was that of a witness, then the sheriff of Stevens county, who was acquainted with the land and the entire surroundings. He said that at that time there was no person living on either section 8 or on section 7; that in fact Mr. Champ had not yet got his buildings up on section 7, but was living temporarily with one Yenter on section 6 to the north, while he was improving his ditch and putting up his buildings; that there was no one in the neighborhood at that time. The fact that the land was vacant and unoc-

cupied is some evidence that it was unappropriated, in the absence of evidence to the contrary. While the burden of proof is upon the appropriator, when his title is questioned, to show that, at the time of his appropriation, the land on which the water was appropriated was vacant and unappropriated, we know, as a matter of fact, that lack of improvement and settlement upon land within the public domain is some evidence that it is unappropriated. There was no controverting evidence or inference that it was appropriated when Champ made his appropriation of the water thereon. Champ made prior paper appropriation and, as the evidence shows, followed it up diligently by making actual, beneficial use of the water prior to any other user or appropriator to the extent, as the evidence tends to show, of at least 200 cubic inches per second. He, therefore, under the Federal statute, *supra*, acquired title by appropriation to the water and to the right of way from the point of diversion through the unoccupied and unappropriated public land. This title was confirmed to him by the terms of the Federal statute above cited. This determination disposes of the first, second, and fifth propositions advanced by appellants.

A further question raised by appellants in their brief, but seemingly not raised by them in the pleadings, is that the decree of the lower court is inequitable because it does not permit the owner of the servient estate to use the easement for the ditch so long as that use does not interfere with the use by the owner of the dominant estate. The appellants contented themselves in their pleadings with denials of all the material allegations of the complaint going to afford the remedy prayed by the respondent. They denied the ownership of the water and of the ditch, and of all the other material allegations. It appears from the evidence in the case that there were about 1,500 cubic inches of water per second of time, by actual measurement, flowing across the lands of appellants in 1913, when they restored the water to the irrigation ditch and cleaned out and repaired the ditch. Re-

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spondent only claims the right to approximately 200 cubic inches of water, which is about one-tenth of a cubic foot per second of time. This it seems, under their pleadings and under what seemed vague and indefinite evidence as to the precise amount of water they used continuously, is all that they can be awarded. While the pleadings of appellants were not so framed, respondent brought himself within the domain of equity to receive and to do only what equity awards. This is a case for the measuring of equities. The decree is too narrow in favor of respondent, or not sufficiently explicit. We think it inequitable to allow respondent to recover not only the easement of the waterway, but the entire amount of water flowing in the ditch, by reason of the injunction against appellants from interfering with the flow in the ditch in any way, not even to carry the remaining water to and for the use of their own land. He, or the estate represented, not only would thus perpetually have the 200 cubic inches adjudged to belong to him, but would seem to prevent the beneficial use of the remaining water, allowing its nonuse or waste, which is contrary to public policy. The decree should be explicit that the respondent is entitled to the 200 cubic inches appropriated and used and to take it from Cottonwood creek at the established point of diversion, and to the easement of the waterway as acquired by occupation and prescription from the point of diversion to the place of use on the Wendler lands, to convey the 200 cubic inches, approximately, of water per second of time, and free from interruption, obstruction, or interference therewith by appellants or any of them; that the remainder of the 1,500 cubic inches of water, approximately, whatever it may be, not otherwise appropriated, may be divided and separated at the intake or point of diversion of the respondents and taken thence by their own ditches, to and upon the lands of appellants for their beneficial use. The decree is modified accordingly for precision and certainty, and in all other respects affirmed.

MORRIS, C. J., PARKER, and MAIN, JJ., concur.

[No. 13492. *En Banc*. December 26, 1916.]

GOLDEN EAGLE MINING COMPANY, *Appellant*, v. IMPERATOR-
QUILP COMPANY *et al.*, *Respondents*.¹

LIMITATION OF ACTIONS—FORM OF ACTION—RELIEF ON GROUND OF FRAUD—TRESPASS—ACCRUAL. An action to recover damages for wrongful entry upon a mining claim and the removal of ore from plaintiff's lands through defendants' underground workings, which was not discoverable at the time, is not an action for relief upon the ground of fraud, under Rem. Code, § 159, providing that such an action shall not be deemed to have accrued until three years after the discovery of the fraud, but an action of trespass that is barred by Id., § 155, after three years.

Appeal from a judgment of the superior court for Ferry county, Pendergast, J., entered February 16, 1916, upon sustaining a demurrer to the complaint, dismissing an action for trespass. Affirmed.

A. J. Laughon and LeRoy McCann, for appellant.

Voorhees & Canfield, for respondents.

PARKER, J.—As we proceed we think it will appear that this is nothing more than an action to recover damages resulting from trespass upon real property, though counsel for the plaintiff insist that it is, in substance, an action for relief upon the ground of fraud. The defendants demurred to the plaintiff's complaint upon the ground that it appears from the allegations thereof that the action has not been commenced within the time limited by law. This demurrer being sustained by the trial court, and the plaintiff electing to not plead further, judgment of dismissal was rendered, from which it has appealed to this court.

The facts, as alleged in the complaint, may be summarized as follows: Appellant and respondents are the owners of adjoining mining claims in the Eureka mining district of Ferry county. Between September 15, 1910, and August

¹Reported in 161 Pac. 848.

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Opinion Per PARKER, J.

20, 1912, in their mining operations upon their claim, respondents exposed and developed their vein or lode of ore to a point of intersection of the same with the boundary line between the two claims to a depth of between three hundred and five hundred feet below the surface of the ground, and knowingly, wrongfully entered upon and into appellant's claim at that point and extracted and removed ore therefrom of the value of several thousands of dollars. There were no underground workings of any character upon appellant's claim and it did not discover, nor have any means of discovering, respondents' wrongful removal of the ore until December 15, 1912. On December 3, 1915, over three years after the wrongful removal of the ore from appellant's mine, but less than three years after its discovery thereof, appellant commenced this action in the superior court for Ferry county seeking recovery of the value of the ore so wrongfully removed.

The only question here presented is as to when the statute of limitations commenced to run against appellant's right to recover; that is, when did appellant's cause of action accrue within the meaning of our statute? The portions of our statute here necessary for us to notice read as follows:

"Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; . . ." Rem. Code, § 155.

"Within three years,—1. An action for waste or trespass upon real property; . . . 4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; . . ." Id., § 159.

We have a number of other special provisions providing for suspension of the statute in certain specified cases, but none of such provisions come as near touching the question of such suspension of the commencement of the running of the

statute in this case as does subdivision 4 of § 159, above quoted, relating to actions for relief upon the ground of fraud. The fact, however, that there are these several special provisions limiting the commencement of the running of the statute in certain cases to a time after the actual accrual of the cause of action is of interest in our present inquiry, in that they evidence a legislative intent to do away with all other exceptions to the general rule that statutes of limitation commence to run upon the accrual of the cause of action, that is, upon the arrival of the time when the plaintiff has a right to sue, regardless of his knowledge of such right.

It is argued in appellant's behalf that this is an action for relief upon the ground of fraud, and that, therefore, the statute did not commence to run against appellant's right to sue until it discovered its loss caused by respondents' wrongful removal of the ore. It seems to us that this contention has been logically answered in our recent decisions in *Cornell v. Edsen*, 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279, and *Thomas v. Richter*, 88 Wash. 451, 153 Pac. 333. The *Edsen* case was one for damages against an attorney for wrongfully voluntarily dismissing an action, concealing the fact and leading his client to believe that his case had been decided against him upon the merits. This was held not to be an action for relief upon the ground of fraud, in that fraud was not the gravamen nor an essential element of the cause of action, and that, therefore, it was barred at the expiration of three years from its accrual, regardless of the knowledge of the client. The *Richter* case was one in which damages were sought against a trustee of a corporation for the benefit of creditors because of the unlawful diminution of the capital stock of the corporation by the trustee in violation of a statute making such act unlawful and rendering the trustee personally liable to creditors therefor. This was also held not to be an action for relief upon the ground of fraud and that, therefore, it was barred, regardless of the stockholders' knowledge of the wrong, at the expiration of

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three years. These decisions, it is true, do not deal with underground mining trespass, but they do, we think, deal with cases in which there would have been fully as much reason for holding the action to be for relief upon the ground of fraud as in this case. The wrongs there involved could as well be characterized "fraudulent" as the wrong here involved. In the *Richter* case, at page 455, Judge Fullerton, speaking for the court, said:

"To constitute an action for 'relief on the ground of fraud,' the fraud must be the substantive cause of the action, the cause without which the action would not exist; the fraud must have been practiced upon the complaining party, causing him to assume some obligation or liability or suffer some loss which but for the fraud he would not have assumed or suffered."

This, it seems to us, is the key to the solution of the problem here involved. Nothing seems plainer to us than that appellant's cause of action in this case does not rest upon the fact that there was wrongdoing on the part of respondents which could in a sense be characterized as fraud or deceit. An ordinary theft and the concealing of it is no less wrongful or fraudulent; yet, plainly, one who is deprived of his property by another by any such wrong has no more complete or perfect right of action for its recovery or damages for its loss than when his property is taken by some method unattended by wrong of this character. In other words, such fraud and deceit, if one chooses to so characterize the wrong, adds nothing to the completeness of the injured person's cause of action.

Our attention has been called to two decisions which apparently hold that the secret taking of ore from beneath the surface of the ground is in effect a fraud upon the rights of the owner of the property trespassed upon, such as gives him a cause of action for relief upon the ground of fraud. Such, in substance, was the holding of the Pennsylvania supreme court in *Lewey v. Fricke Coke Co.*, 166 Pa. St. 586, 31 Atl.

261, 45 Am. St. 684, 28 L. R. A. 283, which holding, however, seems to have been without reference to any statute controlling the question. Such also was the holding of the supreme court of California in *Lightner Min. Co. v. Lane*, 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C 1093, under a statute apparently the same as our own. These appear to be the only American decisions holding that underground trespass in mining cases constitute such an exception to the rule of the statute of limitations relative to waste or trespasses upon real property. Mr. Lindley, apparently resting his conclusion upon these decisions, seems to regard the rule they announce as the correct rule. Lindley, Mines (3d ed.), § 867.

We are, however, unable to assent to this doctrine, and adhere to the views expressed in our own recent decisions above noticed, which we regard as controlling in this case. Much argument is indulged in by counsel for appellant touching the justice of the rule they contend for. This, however, it seems to us, as plausible as it is, has to do with the policy of the law only, which opens a wide field for discussion and difference of opinion. It is easy to argue relative to any statute of limitations as applied to a particular case that it works injustice. But it must be remembered that these are statutes of repose, and as said in *Thomas v. Richter*, *supra*:

"It is believed that it is better for the public that some rights be lost than that stale litigation be permitted."

We conclude that the judgment must be affirmed. It is so ordered.

MORRIS, C. J., MOUNT, MAIN, ELLIS, FULLERTON, HOLCOMB, and CHADWICK, JJ., concur.

Oct. 1916]

Opinion Per Curiam.

[No. 13302. Department One. October 4, 1916.]

GREAT NORTHERN RAILWAY COMPANY, *Respondent*, v. KING COUNTY
et al., *Appellants*.¹

Appeal from a judgment of the superior court for King county, Ronald, J., entered December 14, 1915, upon findings in favor of the plaintiff, in an action to cancel a tax, tried to the court. Affirmed.

Alfred H. Lundin, Robert H. Evans, and S. M. Brackett, for appellants.

F. V. Brown and F. G. Dorety, for respondent.

PER CURIAM.—The questions presented in this case are identical with the questions presented in *Northern Pac. R. Co. v. King County*, ante p. 89, 160 Pac. 8, and for the reasons therein stated, the judgment is affirmed.

[No. 13390. Department Two. October 9, 1916.]

SEATTLE SEED COMPANY *et al.*, *Respondents*, v. THE CITY OF SEATTLE,
Appellant.²

Appeal from a judgment of the superior court for King county, Jurey, J., entered October 8, 1915, upon findings in favor of the plaintiffs, in an action for damages to property, tried to the court. Affirmed.

James E. Bradford, Melvin S. Good, Hugh M. Caldwell, and Walter F. Meter, for appellant.

Byers & Byers, for respondents.

PER CURIAM.—The facts in this case are substantially the same as those in the case of *Imperial Candy Co. v. Seattle*, ante p. 145, 160 Pac. 303. The two cases were argued together, and are not distinguishable. Upon the authority of that case, the judgment will be affirmed.

¹Reported in 160 Pac. 11.

²Reported in 160 Pac. 304.

[No. 13623. *En Banc*. October 24, 1916.]

SARAH ELIZABETH GARDNER, *Respondent*, v. MINNIE ALICE FREDERICK
et al., *Appellants*.¹

Motion to dismiss an appeal from a judgment of the superior court for Spokane county, Blake, J., entered March 16, 1916. Denied.

Clyde H. Belknap and *Fred M. Williams*, for appellants.

John M. Gleeson, for respondent.

PER CURIAM.—Plaintiff-respondent has moved to dismiss this appeal upon two grounds, (1) that the notice of appeal was not served upon the surety in a costs bond filed by plaintiff in the lower court; (2) that the appeal bond is not conditioned as required by the governing statute, Rem. 1915 Code, § 1722.

To meet the first ground, appellants have filed in this court a written waiver releasing the surety in the costs bond from all liability thereon. Under our recent decision in *Roberts v. Pacific Telephone & Telegraph Co.*, ante p. 233, 160 Pac. 753, the motion on the first ground must be denied.

We have examined the appeal bond and find that its conditions present a substantial compliance with the statutory requirements.

The motion is overruled.

[No. 13793. *En Banc*. October 24, 1916.]

J. A. TALKINGTON, *Guardian etc.*, *Respondent*, v. WASHINGTON WATER
POWER COMPANY, *Appellant*.¹

Motion to dismiss an appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered June 17, 1916. Denied.

Post, Russell, Carey & Higgins, for appellant.

Merritt, Lantry & Merritt, for respondent.

PER CURIAM.—Plaintiff-respondent has moved to dismiss this appeal on the ground that the notice of appeal was not served upon the surety in a costs bond filed by plaintiff in the court below. Defendant-appellant has filed in this court a written waiver of any claim that it might have had upon any contingency against such surety by reason of such bond, and stipulating and agreeing that such bond may be forthwith cancelled and held for naught. The case thus falls within our decision in *Roberts v. Pacific Telephone & Telegraph Co.*, ante p. 233, 160 Pac. 753. Following that decision, the motion is denied.

¹Reported in 160 Pac. 754.

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Opinion Per Curiam.

[No. 13348. Department One. November 13, 1916.]

CLARKE & EATON COMPANY, *Appellant*, v. WARDEN INVESTMENT
COMPANY, *Respondent*.¹

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered October 25, 1915, upon findings in favor of the defendant, in an action for damages, tried to the court. Affirmed.

Peacock & Ludden, for appellant.

Wakefield & Witherspoon (*E. P. Twohy*, of counsel), for respondent.

PER CURIAM.—The question in this case is whether a payment of interest amounting to \$1,466.64, made upon a note secured by a real estate mortgage, should be credited upon a note executed by the defendant and held by the plaintiff. The trial court, upon the issues of the case, found that a settlement and stated account was had by the parties, and that the defendant had assumed this payment in addition to the note held by the plaintiff. The evidence plainly sustains this finding. The judgment must therefore be affirmed.

[No. 13318. *En Banc*. November 15, 1916.]

JESSE W. SPEAR *et al.*, *Appellants*, v. THE CITY OF BREMERTON,
Respondent, KITSAP HOTEL INVESTMENT COMPANY *et al.*,
Interveners.²

Appeal from a judgment of the superior court for Kitsap county, Dykeman, J., entered November 24, 1915, dismissing an action for equitable relief, after a trial to the court. Modified.

A. C. Durham and Robinson & Robinson, for appellants.

Marion Garland and Bryan & Colvin (*J. W. Bryan*, of counsel), for respondent and interveners.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 90 Wash. 507, 156 Pac. 825, and for the reasons there stated, the judgment is modified.

¹Reported in 160 Pac. 1199.

²Reported in 160 Pac. 946.

[No. 13181. *En Banc*. December 8, 1916.]

In the Matter of the ESTATE OF JOSEPH TACHL

ANTONIA TACHL, *Appellant*, v. JOHN P. KENT, *as Administrator*,
Respondent.¹

Appeal from a judgment of the superior court for Walla Walla county, McCroskey, J., entered June 7, 1915, allowing an administrator's final account, on objections by the sole heir. Modified.

John C. Hurspool, for appellant.

F. A. Garrecht and Evans & Watson, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 90 Wash. 621, 156 Pac. 833, and the judgment is accordingly modified.

[No. 13737. *En Banc*. December 26, 1916.]

LONE PINE-SURPRISE CONSOLIDATED MINING COMPANY, *Appellant*, v.
INSURGENT GOLD MINING COMPANY *et al.*, *Respondents*.¹

Appeal from a judgment of the superior court for Ferry county, Pendergast, J., entered February 15, 1916, upon sustaining a demurrer to the complaint, dismissing an action for damages for trespass. Affirmed.

Wakefield & Witherspoon and *G. V. Alexander*, for appellant.

James T. Johnson, for respondents.

PER CURIAM.—This case involves the same question of limitation of an action to recover for underground trespass as in *Golden Eagle Mining Co. v. Imperator-Quilt Co.*, ante p. 692, 161 Pac. 848. Upon the authority of that decision, the judgment in this case is affirmed.

¹Reported in 161 Pac. 469.

²Reported in 161 Pac. 850.

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30. **APPEAL—REVIEW—HARMLESS ERROR.** Appellant cannot complain that the jury estimated commissions for the exchange of property at a lower rate than the respondent was entitled to. *Godefroy v. Hupp* 371

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31. **APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.** In an action to recover the value of property, exempt to plaintiff as a householder and farmer, error in instructions authorizing a verdict for plaintiff if the jury found he was a householder is harmless where it was undisputed that he was also a farmer. *Shell v. Svensson*..... 40
32. **APPEAL—REVIEW—INSTRUCTIONS—REQUESTS.** Error cannot be based upon the refusal of requested instructions sufficiently covered in the general charge. *Flessner v. Carstens Packing Co.*..... 48
33. **APPEAL—REVIEW—INSTRUCTIONS—REQUESTS.** It is not error to refuse to give requested instructions that are covered in the general charge. *Gilson v. Washington Water Power Co.*....., 480
34. **APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS.** It is not reversible error to refuse requested instructions that are merely a specific elaboration of more general instructions referring to the issues to be determined, where, upon the whole, the case was fairly submitted to the jury. *Smith v. Harrington*..... 681

APPLIANCES:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 3-5, 7.

APPLICATION:

Of payment, see **PAYMENT**.

APPOINTMENT:

Of judge, see **JUDGES**, 1.

Of municipal employees, see **MUNICIPAL CORPORATIONS**, 2, 3.

APPROPRIATION:

Of water rights in public lands, see **WATERS AND WATER COURSES**, 1-13.

ARBITRATION AND AWARD:

Arbitration of contractors' disputes by architect, see **CONTRACTS**, 3.

1. **ARBITRATION AND AWARD—AGREEMENT—VALIDITY—STATUTES.** Under Rem. 1915 Code, § 421, providing that an agreement to arbitrate shall be in writing, signed by the parties, and may be by bond in any sum, conditioned to abide the award, an agreement to arbitrate need not contain an express provision to "abide the award"; as that applies only to an arbitration by bond, and is implied. *Suksdorf v. Suksdorf* 667
2. **SAME—COMMON LAW ARBITRATION—STATUTES.** Common law arbitrations are entirely supplanted in this state by Rem. 1915 Code, §§ 420-430. *Suksdorf v. Suksdorf*..... 667
3. **SAME—REQUISITES—PROCEEDINGS—WAIVER OF OBJECTIONS.** Where both parties moved for judgment upon an arbitration, after a hear-

ARBITRATION AND AWARD—CONTINUED.

ing, without objection to the agreement, the court acquired jurisdiction to confirm the award, and it is too late to object that the submission was insufficient in failing to agree to abide the award.
Sukadorf v. Sukadorf..... 667

ARCHITECTS:

Arbitration of contractors' disputes by, see **CONTRACTS**, 3.

ARGUMENT OF COUNSEL:

As harmless error, see **APPEAL AND ERROR**, 29.

Ground for new trial, see **NEW TRIAL**, 1.

ASSENT:

Of stockholders to sale of assets by insolvent corporation, see **CORPORATIONS**, 12.

ASSESSMENT:

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 21-23.

Of tax, see **TAXATION**.

ASSETS:

Of corporation, winding up business, see **CORPORATIONS**, 9, 10.

Of corporation, disposition on dissolution on insolvency, see **CORPORATIONS**, 11, 12.

ASSIGNMENT OF ERRORS:

In brief, see **APPEAL AND ERROR**, 12.

ASSIGNMENTS:

To secure debt, as chattel mortgage, see **CHATTEL MORTGAGES**, 2.

Of contract for improvement, see **MUNICIPAL CORPORATIONS**, 11.

To bank by contractor as security for advances, see **MUNICIPAL CORPORATIONS**, 13-17.

Of labor claims against contractor on public work, see **MUNICIPAL CORPORATIONS**, 14-17.

ASSIGNMENTS FOR BENEFIT OF CREDITORS:

Rights of assignee under conditional sale contract, see **SALES**, 2, 3.

ASSUMPTION:

Of facts in charge to jury, see **CRIMINAL LAW**, 3; **TRIAL**, 8, 9.

Of risk by employee, see **MASTER AND SERVANT**, 5, 6.

Of mortgage by vendee, see **VENDOR AND PURCHASER**.

ATTACHMENT:

1. **ATTACHMENT—WHEN LIES—"INDEBTEDNESS"—CLAIM FOR DAMAGES.**
 An unliquidated claim for damages for breach of covenant is an "indebtedness" within Rem. 1915 Code, § 648, authorizing a writ of

ATTACHMENT—CONTINUED.

- attachment in certain actions upon the filing of an affidavit showing that the defendant is "indebted" to the plaintiff, specifying the amount of such "indebtedness" over and above all just credits and offsets. *State ex rel. Getzelman v. Superior Court*..... 98
2. **SAME—WHEN LIES—CLAIMS FOR DAMAGES—STATUTES.** Subdivision 9 of Rem. 1915 Code, § 648, authorizing an attachment in actions for damages arising from the commission of some felony does not limit the causes for which the attachment may be issued in actions for damages; but the attachment may issue under other subdivisions when the debt is alleged to be due and the defendants are non-residents. *State ex rel. Getzelman v. Superior Court*..... 98
3. **ATTACHMENT—COMMUNITY PROPERTY—PARTIES.** In an attachment upon community property, it is not necessary to name the wife as a party to the attachment, and it only binds the property on which it is levied. *Godefroy v. Hupp*..... 371
4. **SAME—DISSOLUTION—MOTION.** In the absence of a motion to dissolve an attachment below, it is too late to seek its dissolution on appeal after it had been carried into the judgment. *Godefroy v. Hupp* 371

ATTENDANCE AT COURT:

As granting immunity to nonresident from service of process, see **PROCESS**.

ATTORNEY AND CLIENT:

- Statements of attorney as admissions, see **ADULTERY**, 2.
- Harmless error in argument of counsel, see **APPEAL AND ERROR**, 29.
- Priority of claim for attorney's fees, see **BANKRUPTCY**, 8.
- Suspension of attorney from practice as disqualification to office of superior judge, see **JUDGES**, 2.
- Misconduct of counsel ground for new trial, see **NEW TRIAL**, 1.
1. **ATTORNEY AND CLIENT—LIEN—WAIVER.** An attorney waives his attorney's lien on a claim which he held for collection for a corporation, by failing to reserve the lien in a stipulation which he signed as a stockholder agreeing to turn over all assets to a trustee for administration. *Jensen v. Kohler*..... 8
2. **SAME—EXCESSIVE CHARGES—STATUTES—SUMMARY REMEDY.** The summary method provided by Rem. 1915 Code, §§ 137, 138, for the adjustment of excessive attorney's charges is not exclusive, and a trustee of a corporation appointed by stipulation may maintain an action to enforce the agreement against the parties, including an attorney withholding an excessive fee. *Jensen v. Kohler*..... 8

AUTHORITY:

- Of factor, see **FACTORS**, 1.
- Of port district to spend funds for political use, see **MUNICIPAL CORPORATIONS**, 1.

AUTHORITY—CONTINUED.

Of fireman's pension board, see MUNICIPAL CORPORATIONS, 4-6.

Scope of conferred by ordinance authorizing improvement, see MUNICIPAL CORPORATIONS, 10.

AWARD:

See ARBITRATION AND AWARD.

BALLOTS:

Designation of office, see ELECTIONS, 1.

BANKRUPTCY:

1. **BANKRUPTCY—COLLATERAL—TITLE OF TRUSTEE—ADJUDICATION OF PRIORITY.** The trustee in bankruptcy is vested by law with all title to the assets of the bankrupt, including securities held by the creditor as collateral, especially after being substituted as plaintiff in an action wherein the securities were in suit; hence the bankruptcy court had jurisdiction to determine the validity of the creditor's claim to the collateral. *American Savings Bank & Trust Co. v. Munson* 78
2. **BANKRUPTCY—DIVIDENDS—CREDITOR HOLDING COLLATERAL—WAIVER—CONSTRUCTION—EVIDENCE TO EXPLAIN WRITING.** Where a bank, holding insurance policies of a bankrupt as collateral to secure an indebtedness, refused to indorse drafts given in settlement of the policies until after parties in interest had signed a letter directing the bank to indorse the drafts to the trustee in bankruptcy without incurring obligation or responsibility for so doing, such letter is sufficiently indefinite to admit of parol evidence that the bank's purpose was to turn over the drafts to the trustee without waiving any of its rights against the parties directing such indorsements, and submitting its claim of priority to the fund for adjudication by the bankruptcy court. *American Savings Bank & Trust Co. v. Munson* 78
3. **SAME—DIVIDENDS—ADJUDICATION OF PRIORITY—PARTIES—PERSONS CONCLUDED.** An order of the bankruptcy court declaring a dividend and adjudicating the claim of a bank to priority in a fund collected from insurance companies on policies held by the bank as collateral, is binding upon indorsers who were parties to the settlement with the insurance companies and who had notice of the intention to declare the dividend, and consented to the payment of the policies to the trustee while parties to the bankruptcy proceedings, although they voluntarily withdrew their claim in the bankruptcy proceeding prior to the declaration of the dividend, in view of their relation to the whole transaction. *American Savings Bank & Trust Co. v. Munson* 78
4. **BANKRUPTCY—PREFERENCES—SET-OFF OF BANK DEPOSITS.** In the absence of fraud or collusion between a bank and its bankrupt customer, the bank is not required to surrender to the trustee in bank-

BANKRUPTCY—CONTINUED.

- ruptcy deposits made by the bankrupt as a condition precedent to proving the balance of its claim, but has a right to appropriate the deposit to the payment of the indebtedness. *Dunlap v. Seattle National Bank* 568
5. **SAME.** To constitute a preferential transfer and voidable preference, within the meaning of the bankruptcy act, there must be a parting with the bankrupt's property for the benefit of the creditor and a diminution of the bankrupt's estate, and the balance of an account current when the transactions cease is to be taken as determining whether there has been an advancement constituting a voidable preference; hence no preference is shown where, at the beginning of the four months' period prior to the filing of the petition, the bankrupt's estate had a credit balance with a bank, and during the period the bank, although it received deposits from time to time, had paid over to the estate a greater sum than it had received. *Dunlap v. Seattle National Bank*..... 568
6. **SAME—PREFERENCES—MORTGAGE TO SECURE ADVANCES—NOTICE OF INSOLVENCY.** A note and mortgage given to a bank to secure past and future advances, upon which overdrafts were permitted, in the absence of fraud or collusion, does not constitute a voidable preference within the meaning of the bankruptcy act, where the bank did not have reasonable cause to believe that the taking of the security would effect a preference, nor knowledge of facts which, if pursued, would have shown insolvency; mere suspicion is not sufficient, the burden being upon the trustee to show reasonable grounds of belief. *Dunlap v. Seattle National Bank*..... 568
7. **BANKRUPTCY—PREFERENCES—KNOWLEDGE OF INSOLVENCY.** Where a bankrupt bank closed on May 16, and on the previous day at about 4 o'clock in the afternoon, an officer of a creditor bank had notice of the insolvency, remittances received by the creditor through the mails on the morning of the 16th, constitute an avoidable preference, in the absence of evidence as to the time they were mailed. *Dunlap v. Seattle National Bank*..... 568
8. **SAME—COSTS—ATTORNEY'S FEES—PRIORITY.** The allowance of a \$500 attorney's fee to an attorney for a trustee in bankruptcy for collecting \$6,000 on insurance policies stands in relation to that fund as money paid or expenses incurred in the preservation of the estate, having priority to all other claims save taxes, under § 64 of the bankruptcy act. *American Savings Bank & Trust Co. v. Munson* 78
9. **SAME—TRUSTEE'S FEES—WAIVER—PARTIES BOUND BY ALLOWANCE.** Parties who made no objection to the allowance of fees to a trustee in bankruptcy, when their attorney was present in court at the time the allowance was made, cannot assert that the trustee had agreed with the attorney not to charge any fees. *American Savings Bank & Trust Co. v. Munson*..... 78

BANKS AND BANKING:

- Right to set off deposits against debt of bankrupt, see **BANKRUPTCY**, 4.
- Fraudulent conspiracy in allowing overdrafts, see **CONSPIRACY**.
- Advancements to contractor on public work, see **MUNICIPAL CORPORATIONS**, 13-17.
- Application of payments on note held by bank, see **PAYMENT**.
- Bank as collecting agent, sufficiency of evidence, see **PRINCIPAL AND AGENT**.
- Deduction from taxes of value of real estate owned by bank, see **TAXATION**, 3-5.
- Deposit of trust funds in bank, see **TRUSTS**.

BAR:

- Of action by former adjudication, see **ACTION; JUDGMENT**.
- Of action by limitation, see **LIMITATION OF ACTIONS**.

BENEFITS:

- Assessment of for local improvements, see **MUNICIPAL CORPORATIONS**, 23.

BEST AND SECONDARY EVIDENCE:

- In civil actions, see **EVIDENCE**, 4, 5.

BETTERMENTS:

- Allowance for, see **EJECTMENT**.

BILLS AND NOTES:

- As creating separate or community debts, see **HUSBAND AND WIFE**, 5, 7.
- Mortgage notes, see **MORTGAGES**.
- Failure of consideration, see **PATENTS**.
- Right as to application of payment by holder of collateral, see **PAYMENT**.

1. **BILLS AND NOTES—VALIDITY—FAILURE OF CONSIDERATION.** There is entire failure of consideration for a mortgage note given as part consideration for the price of land, where, by mutual agreement, the sale was rescinded and an assignee of the note was informed of that fact when he took the note and agreed, in its stead, to take the note of the vendor. *Hornburg v. Larson*..... 74
2. **SAME.** The fact that the vendor simply signed the purchaser's note, which the parties had agreed to redeliver, and delivered it to the assignee, would not deprive the purchasers of the defense of failure of consideration. *Hornburg v. Larson*..... 74
3. **SAME—NEGOTIABILITY—PROVISIONS IN MORTGAGE AS TO SECURITY.** Mortgage notes are not rendered nonnegotiable by provisions in the mortgage respecting insurance, payment of taxes and attorney's fees on foreclosure which would have rendered the notes nonnegotiable

if incorporated in the notes, as the provisions relate merely to the preservation of the security. *Moore & Co. v. Burling*..... 217

4. **BILLS AND NOTES—LIABILITY OF INDORSERS—PREVIOUS AGREEMENT—MODE OF PAYMENT—FRAUDS, STATUTE OF—EVIDENCE—PAROL TO VARY WRITING.** Regular indorsers of a mortgage note, negotiable on its face, warrant the genuineness of the instrument, the title, the capacity of all prior parties to contract and that the instrument was valid and subsisting at the time, and in addition engage to pay on notice of dishonor; and, therefore, they cannot avail themselves of a prior agreement by an indorser to accept in payment a quitclaim deed of the mortgaged property; since (1) such agreement if existent, is superseded by the indorsement, and (2) the indorsement cannot be varied or altered by a contemporaneous oral agreement, void under the statute of frauds. *Fidelity National Bank of Spokane v. Stanton Co.*..... 344
5. **BILLS AND NOTES—LIABILITY—DEFENSES—COLLATERAL AGREEMENT—"UNQUALIFIED PROMISE."** A promissory note, containing an absolute and unconditional promise to pay a fixed sum upon a day certain cannot be qualified by affixing a collateral agreement that the same was to be paid only by the sale of lots and the application of the proceeds of the sales. *Van Tassel v. McGrail*..... 380
6. **SAME.** In such a case, though the two writings be construed together as one instrument, it is an absolute promise to pay, negotiable in character, within the meaning of Rem. 1915 Code, § 3394, declaring that an unqualified order or promise to pay is unconditional though coupled with an indication of a particular fund out of which the reimbursement is to be made; hence the condition is at best merely a privilege available as a defense only upon misapplication of available proceeds. *Van Tassel v. McGrail*..... 380
7. **SAME—RENUNCIATION—STATUTES—APPLICATION.** Rem. 1915 Code, § 3512, providing that the holder of a negotiable instrument must renounce his rights in writing unless the instrument is delivered up has no application to a note for which the consideration failed, to the knowledge of the holder at the time he acquired it. *Hornburg v. Larson*..... 74
8. **BILLS AND NOTES—BONA FIDE HOLDERS—FRAUD—NOTICE—EVIDENCE—SUFFICIENCY.** Although a large discount puts a purchaser on inquiry, that fact, with notice that mortgage notes were given in payment of mining stock, is not sufficient to show that the purchaser had notice of fraud in the procurement of the notes, where inquiry was made of the maker before purchase and the maker stated that the notes were all right, and it was shown that the investment was not well thought of. *Moore & Co. v. Burling*..... 217
9. **BILLS AND NOTES—BONA FIDE HOLDER—DUTIES—EVIDENCE—SUFFICIENCY.** There can be no imputation of bad faith from the fact of

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- taking negotiable paper, fair on its face, without active inquiry, nor by mere speculation as to diligence or negligence, and evidence going no further, and showing no actual notice, is insufficient to sustain findings that plaintiff was not a *bona fide* purchaser for value. *Citizens Bank & Trust Co. v. Limpright*..... 361
10. SAME—BONA FIDE PURCHASER—COLLATERAL EXECUTORY AGREEMENT—NOTICE—"DEFECTIVE" TITLE. Where defendant gave a note for the full purchase price of an automobile, with a collateral executory agreement that the valuation of his old car, traded in at the time, instead of being then credited, should be applied in part payment of the note sixty days hence, the plain purpose was to enable the seller to raise money on the note, and knowledge thereof would not charge a purchaser with bad faith or make his title "defective" under Rem. 1915 Code, § 3446; since he did not obtain it by fraud, duress, unlawful means or for illegal consideration nor pledge it in breach of faith, no breach of the executory agreement having occurred. *Citizens Bank & Trust Co. v. Limpright*..... 361
11. SAME—BONA FIDE HOLDERS—DISCOUNT—AMOUNT OF RECOVERY. Under Rem. 1915 Code, § 3448, providing that the holder in due course holds the instrument free from any defects and may enforce payment for the full amount against all parties, a *bona fide* purchaser at a large discount may recover from the maker the full face of mortgage notes. *Moore & Co. v. Burling*..... 217
12. SAME—BONA FIDE HOLDER—AMOUNT OF RECOVERY—DISCOUNT. Under Rem. 1915 Code, § 3418, declaring that, where the holder has a lien on the instrument, he is deemed a holder for value to the extent of the lien, a bank taking a note as collateral to a loan for eighty per cent of its face, can recover from the maker, having a good defense as against the payee, only to the extent of the lien, with interest at the legal rate, in the absence of any evidence as to the rate of interest agreed upon. *Citizens Bank & Trust Co. v. Limpright* 361
13. SAME—ACTION—FAILURE OF CONSIDERATION—ORAL EVIDENCE—ADMISSIBILITY. It is competent to show by oral proofs that the consideration for a note, given for the purchase price of land, had failed, to the knowledge of the holder, by a mutual rescission of the sale. *Hornburg v. Larson*..... 74

BONA FIDE PURCHASER:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 8-12.
Under conditional sales contract, see **SALES**, 3, 4.

BONDS:

Of husband as community debt, see **HUSBAND AND WIFE**, 3, 4.
Contractor's bonds, see **MUNICIPAL CORPORATIONS**, 12-17.

BOOKS OF ACCOUNT:

Admissibility in evidence, see **EVIDENCE**, 5.

BOUNDARIES:

Of state tide and shore lands, see **NAVIGABLE WATERS**, 1, 3, 4, 7, 8.

1. **BOUNDARIES—LOCATION—REESTABLISHMENT—EVIDENCE—SUFFICIENCY.** Evidence to fix a section corner one-half mile from its true location as called for by the government field notes must be clear and certain. *Reed v. Firestack*..... 148
2. **SAME—LOCATION—REESTABLISHMENT—FIELD NOTES.** Where there is no evidence of any of the interior section corners on a township line, commissioners appointed in pursuance of Rem. 1915 Code, § 948, properly reestablish the same by following the government field notes. *Reed v. Firestack*..... 148
3. **SAME—REESTABLISHMENT—EVIDENCE.** The location of a lost boundary line cannot be influenced by the fact that a section corner a mile distant had been recognized by a number of other owners not interested in the controversy, in the absence of evidence that it was the true corner. *Reed v. Firestack*..... 148
4. **SAME—PROCEEDINGS TO REESTABLISH—REPORT OF COMMISSIONERS—EXCEPTIONS.** In proceedings to reestablish a lost boundary line, under Rem. 1915 Code, § 948, exceptions need not be taken to the advisory report of the commissioners as to the location of a corner two miles distant, which they did not follow in their conclusions and which was disregarded by the court. *Reed v. Firestack*..... 148

BREACH:

Of contract, see **CONTRACTS**.

Of implied warranty of wholesomeness of food sold, see **FOOD**.

Of contract to buy logs, see **LOGS AND LOGGING**.

BRIEFS:

On appeal, see **APPEAL AND ERROR**, 12.

BROKERS:

See **FACTORS**.

Rate of commissions, see **CUSTOMS AND USAGES**.

1. **BROKERS—CONTRACT FOR COMMISSIONS—DIVISIBILITY—VALIDITY—STATUTE OF FRAUDS.** An oral agreement to pay a commission on any sale or exchange of defendant's real estate or stock (whether of the real estate alone, the stock alone, or both together) is severable, as the several stipulations are not so interdependent but that a distinct engagement as to any one may be fairly extracted from the whole; hence, on an exchange of both real and personal property, the commissions as to the personalty put in at a definite value is not within the bar of the statute of frauds. *Godefroy v. Hupp*.. 371
2. **SAME—VALIDITY OF CONTRACT—DIVISIBILITY—REALTY AND PERSONALTY.** An oral contract for the payment of commissions on the sale of real estate being void under Rem. 1915 Code, § 5289, a contract

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for commissions on the exchange of both real and personal property, if indivisible, is subject to the bar of the statute in its entirety. *Godefroy v. Hupp*..... 371

3. **SAME—DIVISIBILITY OF CONTRACT — EVIDENCE — ADMISSIBILITY.** In such a case, the broker is not bound by the written contract of exchange, to which he was a stranger, fixing no definite value upon the personalty, but may show by parol evidence the value at which the personalty was estimated in the trade. *Godefroy v. Hupp*.. 371
4. **BROKERS—COMMISSIONS—PROCURING CAUSE — QUESTION FOR JURY.** Whether brokers were the procuring cause of an exchange of properties, is a question for the jury, where they produced the person ready, able and willing to make the exchange, and it is immaterial that the exchange as finally concluded by the principal did not embrace all the property listed. *Godefroy v. Hupp*..... 371

BUILDING CONTRACTS:

See **CONTRACTS**, 3-6.

BUILDINGS:

Property installed in leased building, see **FIXTURES**.

BURDEN OF PROOF:

To establish oral contract, see **CONTRACTS**, 1.

To show silence operating as fraud, see **ESTOPPEL**, 2.

Insanity of plaintiff as tolling statute of limitations, see **LIMITATION OF ACTIONS**, 1, 2.

To show amount of balance of blended account of trustee after dissipation by withdrawals, see **TRUSTS**, 3.

CANCELLATION OF INSTRUMENTS:

Rescission of sale of stock for fraud, see **CORPORATIONS**, 2, 3.

Setting aside fraudulent conveyances, see **FRAUDULENT CONVEYANCES** 2-4.

Setting aside tax deed, see **TAXATION**, 9.

1. **CANCELLATION OF INSTRUMENTS — CONTRACTS — FRAUD IN PROCUREMENT—EVIDENCE—SUFFICIENCY — REPUDIATION — LACHES.** A decree cancelling a contract for fraud in its procurement cannot be sustained upon findings that the plaintiff was a man of advanced years poor eyesight, very hard of hearing, dull of comprehension and worn out with importunities, where the contract was fair in every respect, there was no evidence that plaintiff had any infirmity affecting his ability to contract, and, although a man of considerable experience, he took no steps to repudiate it while valuable improvements were being made in reliance upon it, and his testimony was overcome by that of his adversaries; since fraud in the procurement of a contract between competent persons must be proved by strong

CANCELLATION OF INSTRUMENTS—CONTINUED.

and convincing evidence, and repudiation must be made promptly under circumstances consistent with good faith. *Faucett v. Northern Clay Co.*..... 239

CANDIDATES:

For office, see **ELECTIONS**.

CAPITAL STOCK:

Of corporations in general, see **CORPORATIONS**, 4.

CARRIERS:

Liability of agent for violation of jitney bus act, see **CRIMINAL LAW**, 1.

Title and subject of jitney bus act, see **STATUTES**, 1.

1. **CARRIERS—MOTOR VEHICLES—REGULATIONS—STATUTES**—"COMMON CARRIERS." A corporation organized for the purpose of carrying out a contract with the Port of Seattle whereby the corporation agrees to maintain and operate an auto service to and from the terminal of the ferry operated by the Port and certain designated points in the city, for the purpose of furnishing a transfer service for passengers going to and from the ferry, is a common carrier of passengers for hire, within the meaning of the jitney bus act (Rem. 1915 Code, § 5562-37), requiring such carriers to obtain a permit before engaging in business. *State v. Ferry Line Auto Bus Co.*..... 614
2. **SAME.** Such a corporation is not relieved from the necessity of complying with the jitney bus act by reason of the fact that its service is conducted by it as an integral part of a ferry system operated by a municipal corporation, since such corporation is amenable to the restrictions of the act in like manner as individuals. *State v. Ferry Line Auto Bus Co.*..... 614
3. **CARRIERS—OF PASSENGERS—ELEVATORS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** Evidence that a child entered an elevator holding its mother's hand and that the elevator started quickly with a sudden movement before the child had fairly entered, and that he fell to the floor of the cage, toward the open door and was caught by a projecting floor or mechanism of a projecting indicator over the door, warrants a finding of negligence in the operation and maintenance of the elevator; it being negligence to leave projecting floors or mechanism in the elevator well and at the same time operate the elevator cage with an open door. *Kranszuch v. Trustee Co.*... 629
4. **CARRIERS—TAKING ON PASSENGERS—NEGLIGENCE—CLOSING DOOR—INSTRUCTIONS—HARMLESS ERROR.** Where, in an action for injuries sustained in attempting to enter a pay-as-you-enter car, there was a conflict in the evidence as to whether the car was standing still with the door open as an invitation to enter, or whether the car had started with the door closed, error in instructing that the de-

• **CARRIERS—CONTINUED.**

endant owed the duty to use the highest degree of care, is not prejudicial, taken in connection with other instructions immediately following telling the jury that closing the door upon the plaintiff after he had started to enter was negligence, but that plaintiff could not recover if he tried to enter after the door was closed; since the jury would not receive the impression that the high degree of care first stated was required unless they found that the car door was open under such circumstances as to be an invitation to enter. *Gilson v. Washington Water Power Co.*..... 480

CAUSE OF ACTION:

Splitting of, see **ACTION**.

CERTIFICATE:

To statement of facts, see **APPEAL AND ERROR**, 11.

Certified copies, see **EVIDENCE**, 4.

CHANGE OF POSSESSION:

Necessity as against creditors of vendor, see **FRAUDULENT CONVEYANCES**, 1.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 3.

To jury in civil actions, see **TRIAL**, 8-10.

CHARTER:

Of municipal corporation, see **MUNICIPAL CORPORATIONS**, 2.

CHATTEL MORTGAGES:

Judgment of foreclosure as bar to second action, see **JUDGMENT**, 1.

1. **CHATTEL MORTGAGES—PROPERTY SUBJECT—CHOSE IN ACTION—STATUTES.** The earnings and income of a public service water company are subject to chattel mortgage, under Rem. & Bal. Code, § 3659, providing that mortgages may be made "upon all kinds of personal property and upon . . ." rolling stock, all kinds of machinery and upon boats and vessels, . . . and such like property, and growing crops, etc.; since the general words are not limited by the subsequent enumeration of particular things some of which are not included in the general terms. *Heermans v. Blakeslee*..... 595
2. **CHATTEL MORTGAGES—ASSIGNMENTS TO SECURE DEBT—NECESSITY OF AFFIDAVIT OF GOOD FAITH AND RECORDING.** A chattel mortgage is created by assignments of the "present and future earnings and income" of a water works company, "as security for payments and advances" made or to be made by the assignee, where the assignee's rights thereunder are referred to as "liens hereby created," making the same security for a debt which is to continue to exist until paid, with interest; and hence the same are inferior to the lien of subse-

CHATTEL MORTGAGES—CONTINUED.

quent writs of garnishment, and void as to creditors, unless accompanied by an affidavit of good faith and recorded as required by Rem. & Bal. Code, § 3660. *Heermans v. Blakeslee*..... 595

3. **CHATTEL MORTGAGES—SALES—VALIDITY — RECORDING — CHANGE OF POSSESSION.** Where a vendee in a bill of sale given as security takes possession of the property prior to the claims of other creditors, the bill of sale is not invalid because not accompanied by an affidavit of good faith or not properly recorded. *Haskins v. Fidelity National Bank* 63

4. **CHATTEL MORTGAGES—FORECLOSURE—DEFICIENCY JUDGMENT — PERSONS LIABLE.** A deficiency judgment cannot be entered against individual defendants who had not signed a chattel mortgage, but had misrepresented the financial ability of the mortgagor, where the foreclosure failed because barred by a judgment in a former action involving the same property when the mortgagor disclaimed interest in the property. *Lee v. Pasco Theatre Co.*..... 204

CHILD:

Damages for wrongful death of, see **DEATH**.
Custody of child, see **DIVORCE**.

CHOSE IN ACTION:

See **CHATTEL MORTGAGES**, 1.

CITATION:

See **PROCESS**.
On appeal, see **APPEAL AND ERROR**, 3, 4.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CITIZENS:

Privileges and immunities, see **CONSTITUTIONAL LAW**, 1-3.

CIVIL SERVICE:

Recovery of pension by injured employee, see **MUNICIPAL CORPORATIONS**, 2, 3.

CLAIM OF RIGHT:

To waters in ditch across railroad lands, see **WATERS AND WATER COURSES**, 11.

CLAIMS:

For damages, as debt subject to attachment, see **ATTACHMENT**, 1, 2.
Against estate of bankrupt, see **BANKRUPTCY**, 1-4, 8.
By contractor to architect for damages from delay of subcontractor, see **CONTRACTS**, 3.
For exemptions, time for filing, see **EXEMPTIONS**, 3.

CLAIMS—CONTINUED.

Interest on unliquidated claim, see **INTEREST**.

Against contractor's bond, see **MUNICIPAL CORPORATIONS**, 12-17.

Of laborers against contractor on public work, see **MUNICIPAL CORPORATIONS**, 13-16.

CLASSIFICATION:

Of railroad property for taxation, see **TAXATION**, 2.

CLASS LEGISLATION:

See **CONSTITUTIONAL LAW**, 1-3.

COLLATERAL AGREEMENT:

As to payment of note, see **BILLS AND NOTES**, 4-6.

Parol evidence, see **EVIDENCE**, 6, 8.

COLLATERAL SECURITY:

Adjudication of priority of creditors claims to, see **BANKRUPTCY**, 1.

COLLECTION:

Bank as agent for collection, see **PRINCIPAL AND AGENT**.

COLOR OF TITLE:

To sustain adverse possession, see **ADVERSE POSSESSION**.

COMMERCE:

1. **COMMERCE — "INTERSTATE COMMERCE" — WHAT CONSTITUTES.** The initial movement of a refrigerator car for icing incident to its loading and billing to a point outside the state is a service rendered in the movement of interstate commerce within the Federal employers' liability act. *Aldread v. Northern Pac. R. Co.*..... 209
2. **COMMERCE — INTERSTATE COMMERCE — EMPLOYMENT WITHIN—FEDERAL STATUTE.** The building of a scaffold upon which a workman was to stand while painting the roof of a freight shed used in interstate commerce is not a service rendered in the movement of interstate commerce, within the Federal employers' liability act; since it had no direct or immediate connection with interstate commerce and was not a necessary incident in the movement of interstate freight. *Killes v. Great Northern R. Co.*..... 416

COMMINGLED FUNDS:

See **TRUSTS**, 2, 3.

COMMISSIONERS:

To reestablish lost boundary line, see **BOUNDARIES**.

Power of state land commissioner to lease state lands for purpose of mining, see **MINES AND MINERALS**, 1, 3.

Establishment of harbor lines, see **NAVIGABLE WATERS**, 5.

Powers of public service commission to classify operating property of railroads, see **TAXATION**, 2.

COMMISSION MERCHANTS:

See **FACTORS**.

COMMISSIONS:

Of broker, see **BROKERS**; **CUSTOMS AND USAGES**.

Of factors, see **FACTORS**.

COMMON CARRIERS:

See **CARRIERS**.

COMMON LAW:

Common law arbitrations, see **ARBITRATION AND AWARD**, 2.

COMMUNITY PROPERTY:

See **HUSBAND AND WIFE**, 3-5, 7.

Parties in attachment upon, see **ATTACHMENT**, 3.

COMPENSATION:

Of attorney, see **ATTORNEY AND CLIENT**; **BANKRUPTCY**, 8.

To trustee, waiver of objections to allowance, see **BANKRUPTCY**, 9.

Of broker, see **BROKERS**.

For property taken or damaged for public use, see **EMINENT DOMAIN**.

COMPETENCY:

Of evidence in civil actions, see **EVIDENCE**.

Of experts as witnesses, see **EVIDENCE**, 11, 12.

Of witnesses in general, see **WITNESSES**, 1-4.

COMPROMISE AND SETTLEMENT:

Evidence of offer of compromise, see **EVIDENCE**, 1, 2.

Of claim for personal injuries, see **RELEASE**.

CONCLUSION:

Of witness, see **EVIDENCE**, 11, 12.

CONCLUSION OF LAW:

As to marriage, sufficiency of findings to support, see **MARRIAGE**.

CONCLUSIVENESS:

Of statements in proofs of death, see **INSURANCE**, 2.

Of judgment, see **JUDGMENT**.

Of decisions of engineer as to amount of work to be paid for under city contract, see **MUNICIPAL CORPORATIONS**, 20.

CONDEMNATION:

Taking or damaging property for public use, see **EMINENT DOMAIN**.

CONDITION:

- Precedent to proving claim of creditor, see **BANKRUPTCY**, 4.
Precedent to leasing state lands for mining, see **MINES AND MINERALS**, 3.
Precedent to action by contractor for balance due, see **MUNICIPAL CORPORATIONS**, 19.

CONDITIONAL SALES:

See **SALES**.

CONDUCT:

- Of counsel as harmless error, see **APPEAL AND ERROR**, 29.
Of counsel ground for new trial, see **NEW TRIAL**, 1.

CONSIDERATION:

- For note, see **BILLS AND NOTES**, 1, 2, 7, 13.
Admissibility of parol evidence to show, see **EVIDENCE**, 9.
Failure of on sale of unpatentable device, see **PATENTS**.

CONSPIRACY:

1. **CONSPIRACY—FRAUD—EVIDENCE—SUFFICIENCY.** A fraudulent conspiracy to permit overdrafts in order to enable an insolvent bank to keep open and receive deposits until the co-conspirator was paid or secured cannot be inferred from facts and circumstances lawful in themselves and consistent with an honest purpose; and in such case the evidence is insufficient to show a fraudulent conspiracy where knowledge of the insolvent condition of the bank was not proven and was denied by two witnesses, and there was no proof that the minds of the alleged conspirators were cooperating. *Dunlap v. Seattle National Bank*..... 568

CONSTITUTIONAL LAW:

- Compensation for property taken for public use, see **EMINENT DOMAIN**.
Eligibility of candidate for office of superior judge, see **JUDGES**, 2.
Fireman's pension act as creating vested rights, see **MUNICIPAL CORPORATIONS**, 6.
Attempted reservation to public use of portions of shore lands conveyed, as impairing obligation of contract, see **NAVIGABLE WATERS**, 2.
Validity of requirements for applicants to practice medicine and surgery, see **PHYSICIANS AND SURGEONS**, 1, 2.
Subjects and titles of statutes, see **STATUTES**, 1.
1. **CONSTITUTIONAL LAW—CLASS LEGISLATION—MOTOR VEHICLES—REGULATION—STATUTES—VALIDITY.** The jitney bus act (Rem. 1915 Code, § 5562-37), requiring carriers of passengers for hire in motor propelled vehicles on the streets of cities of the first class to give a surety bond and obtain a permit before engaging in business, is

CONSTITUTIONAL LAW—CONTINUED.

not unconstitutional as class legislation, or violative of the 4th and 5th amendments to the constitution of the United States. *State v. Ferry Line Auto Bus Co.*..... 614

2. CONSTITUTIONAL LAW—CLASS LEGISLATION—MOTHER'S PENSIONS—STATUTES—REPEAL. An abandoned wife, pensioned under the act of 1913 (3 Rem. & Bal. Code, § 8385-1 *et seq.*) cannot object that the act of 1915 (Rem. 1915 Code, § 8385-1 *et seq.*) repealing the former law is unconstitutional as class legislation in that the latter made no provision for abandoned wives; since the earlier act did not provide pensions for all classes of indigent mothers, and is as objectionable in that respect as the act of 1915. *In re Snyder's Petition for Support of Mothers.*..... 59

3. SAME. The act providing pensions for indigent mothers (Rem. 1915 Code, § 8385-1 *et seq.*) is not unconstitutional as class legislation or as denying the equal protection of the laws in that it repeals the act of 1913 authorizing provision for abandoned wives, for whom no provision is made; since the matter is one of public policy only and the pension a voluntary bounty that may be discontinued at any time. *In re Snyder's Petition for Support of Mothers.*..... 59

4. CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF BUSINESS—EMPLOYMENT AGENCIES. It is within the police power of the state to prohibit employment agencies from charging any fee or remuneration for furnishing employment to workers, and initiative measure No. 8 (Rem. 1915 Code, § 6565-1 *et seq.*) is therefore not unconstitutional as in violation of the fifth and fourteenth amendments to the Federal constitution. *State v. Rossman.*..... 530

CONSTRUCTION:

- Of agreement authorizing creditor to turn over funds to trustee, see BANKRUPTCY, 2.
- Of note, mode and form of payment, see BILLS AND NOTES, 6.
- Of contract, see CONTRACTS, 2, 3.
- Of state wide prohibition law, see INTOXICATING LIQUORS, 1-4.
- Of constitutional provision relating to eligibility for office of superior judge, see JUDGES, 2.
- Of contract for sale of mine, see MINES AND MINERALS, 4, 5.
- Of statutes, see STATUTES, 2, 3.

CONTEST:

- Of nomination, time for filing, see ELECTIONS, 2.
- Of will, conclusiveness of judgment as to costs, see EXECUTORS AND ADMINISTRATORS, 2.

CONTRACTORS:

- See CONTRACTS, 3-7.
- On public work, see MUNICIPAL CORPORATIONS, 12-17.

CONTRACTS:

See **BILLS AND NOTES; INSURANCE; SALES.**

Submission to arbitration, see **ARBITRATION AND AWARD.**

Cancellation, see **CANCELLATION OF INSTRUMENTS.**

Operation and effect of customs or usages, see **CUSTOMS AND USAGES.**

Parol evidence to vary, see **EVIDENCE, 6-10.**

For sale of produce by factor, see **FACTORS.**

Agreements within statute of frauds, see **FRAUDS, STATUTE OF.**

Oral agreements between husband and wife after marriage, see **HUSBAND AND WIFE, 1.**

Of husband or wife, see **HUSBAND AND WIFE, 6.**

To buy logs, damages for breach, see **LOGS AND LOGGING.**

For sale of mine, see **MINES AND MINERALS, 4-6.**

Agreement to accept payment of mortgage debt in land, see **MORTGAGES.**

For public improvements, see **MUNICIPAL CORPORATIONS, 10-20.**

Impairing obligation of, see **NAVIGABLE WATERS, 2.**

Agency, see **PRINCIPAL AND AGENT.**

Releasing claim for personal injuries, see **RELEASE.**

Stipulation in actions, see **STIPULATIONS.**

Province of court and jury, see **TRIAL, 6.**

Sales of realty, see **VENDOR AND PURCHASER.**

For water, see **WATERS AND WATER COURSES, 14, 15.**

1. **CONTRACTS — ORAL CONTRACTS — BURDEN OF PROOF.** In an action upon an executed oral contract for the sale of logs, there being no written contract to overcome by clear and convincing evidence, it is sufficient to establish the oral agreement by a preponderance of the evidence. *Hughes v. Eastern R. & Lumber Co.*..... 558
2. **CONTRACTS — CONSTRUCTION BY PARTIES — PAROL EVIDENCE.** Contemporaneous construction cannot be invoked by parol evidence as against the clear terms of an unambiguous written contract. *Blanch v. Pioneer Mining Co.*..... 26
3. **CONTRACTS—BUILDING CONTRACTS—PROVISION FOR ARBITRATION AND NOTICE—"OTHER CONTRACTORS."** The disputes of a general contractor with his materialmen and subcontractors are not submitted to the arbitration of the architects by a contract for the construction of a school building reciting that the heating, plumbing, electric work, painting and general excavation will be let in separate contracts and not included in the general contract, and providing that the general contractors shall allow space to contractors for parts of the work not included in the general contract and that the contractors are to work in harmony and their differences settled by the architects, where the clause in question provided that, should any contractor or subcontractor claim damages on account of the delay or negligence of other contractors, he must give written notice of the claim to the architects for adjustment, etc.; since the same has application only to

CONTRACTS—CONTINUED.

"other contractors" "not included in the general contract," and hence does not require notice of claim for damages by the general contractor on account of the delay of a subcontractor furnishing him mill work on the general contract. *Peterman v. Goss*..... 184

4. **SAME—PERFORMANCE OR BREACH—DELAY—DAMAGES—OFFSET—OVERHEAD CHARGES.** In a subcontractor's action against a contractor, overhead charges for salaries during the period of delay through plaintiff's failure to perform on time will not be allowed as a set-off, where it appears that the general contractor's other work was not finished during that time and that the overhead charges would have been continued and incurred in any event. *Peterman v. Goss*... 184
5. **SAME—PERFORMANCE OR BREACH—DAMAGES—OFFSET.** The cost of handling and refinishing defective mill work rejected by the inspectors, is a proper element of damages to be offset against the claim of a subcontractor furnishing the mill work. *Peterman v. Goss*... 184
6. **SAME—PERFORMANCE OR BREACH—DELAY—DAMAGES—EVIDENCE—SUFFICIENCY.** The conclusion of witnesses that there was a twenty-five per cent loss in efficiency in installing mill work in a school building through delay in furnishing the mill work is not warranted by the fact that ten to fifteen carpenters were laid off at various times by reason of the delay, it appearing that the contractor was not put to the expense of carrying the carpenters when laid off. *Peterman v. Goss*..... 184
7. **SAME—PERFORMANCE OR BREACH—DELAY—DAMAGES—INTEREST.** Interest on money borrowed by a contractor during the time his work was held up by the delay of a subcontractor is a proper element of damages to be offset against the subcontractor's claim. *Peterman v. Goss*..... 184

CONTRIBUTORY NEGLIGENCE:

- Of servant, see **MASTER AND SERVANT**, 8.
- Of person injured on street, see **MUNICIPAL CORPORATIONS**, 26.
- Of owner of goods damaged through flooding of basement, see **MUNICIPAL CORPORATIONS**, 30.
- Of trespasser, see **NEGLIGENCE**, 3.

CONVEYANCES:

- See **CHATTEL MORTGAGES; DEEDS.**
- In fraud of creditors, see **FRAUDULENT CONVEYANCES.**
- Mortgaged property, see **MORTGAGES.**
- Of state tide and shore lands, see **NAVIGABLE WATERS.**

CORPORATIONS:

- See **MUNICIPAL CORPORATIONS.**

1. **CORPORATIONS—STOCK—ISSUANCE—PAYMENT—FRAUD—EVIDENCE—SUFFICIENCY.** Subsequent stockholders cannot claim fraud in that a

CORPORATIONS—CONTINUED.

promoter of a theater company did not pay for his stock and procured their subscriptions by misrepresenting the cost of the theater building at \$75,000, when in fact it cost but \$36,379, where the promoter's stock was paid for by the completion of the building and the good will and booking privileges of his theatrical circuit, which was an asset of great value and earned a dividend of 136 per cent on all the capital stock within three years; and all the stockholders had, for six years, full opportunity to learn how the stock was paid for and did not claim to have relied on the representation as to the cost of the building; since their stock was worth at least all they paid for it. *Eggleston v. Pantages*..... 221

2. CORPORATIONS—STOCK—SALE — RESCISSION — FRAUD — EVIDENCE — SUFFICIENCY. A rescission of sale of stock for fraud is properly refused where it is not shown by clear and convincing evidence that plaintiffs were overreached in a business venture which they believed would be successful after full opportunity to investigate and after full inquiry. *Shaw v. Carr*..... 550
3. SAME—SALE OF STOCK—RESCISSION — FRAUD — EVIDENCE — SUFFICIENCY. Evidence that a company failed to meet its expectations as to the practicability and salability of a machine does not warrant a finding of fraud in the sale of stock, where there was other evidence that the machines were practicable and that the failure of the company was due to want of sufficient working capital. *Shaw v. Carr* 550
4. SAME—CAPITAL STOCK—IMPAIRMENT — GIFT TO CORPORATION—VALIDITY. Where promoters of a corporation had received all of the stock as fully paid up in consideration of rights and property transferred to the corporation, they may lawfully make a gift of part of the stock to the corporation to be sold for its benefit as treasury stock; and such return of stock is not void as an impairment of the capital stock in violation of Rem. 1915 Code, § 3697. *Shaw v. Carr* 550
5. CORPORATIONS — TRUSTEES — TERMS—PRESUMPTIONS. Under Rem. 1915 Code, § 3679, expressly limiting the term of the first trustees of a corporation to six months, there is no presumption that they hold over after such term. *Barnard Manufacturing Co. v. Ralston Milling Co.*..... 111
6. SAME. Under Rem. 1915 Code, § 3687, providing that all acts of trustees of a corporation shall be binding upon the company until their successors are elected and qualified, they do not hold over as a matter of law, in the absence of any evidence on the subject. *Barnard Manufacturing Co. v. Ralston Milling Co.*..... 111
7. SAME—TRUSTEES—LIABILITY—UNAUTHORIZED BUSINESS—EVIDENCE — PRESUMPTION. In the absence of a showing that a corporation began to do business prior to the expiration of the term of trustees named in its articles, or that they were acting as trustees either

CORPORATIONS—CONTINUED.

- when it began to do business or when the transaction occurred, they are not liable for the debts contracted before all the stock was subscribed for. *Barnard Manufacturing Co. v. Ralston Milling Co.*.. 111
8. CORPORATIONS — INSOLVENCY — RECEIVERSHIP AND SALE — FRAUD — LACHES. Stockholders of an insolvent corporation who had notice of receivership proceedings that culminated in a creditor's sale, but made no appearance, are estopped by laches to claim fraudulent concealment as to the conditions, where they allowed the purchasing stockholder to meet all the losses for about three years, and only alleged fraud in the receivership and sale after the business began to show a profit. *Eggleston v. Pantages*..... 221
9. CORPORATIONS — WINDING UP — STIPULATION — RIGHTS OF TRUSTEE. Where the stockholders of a corporation stipulated that all the assets be turned over to a trustee for administration, one who retains any of the assets and divides them among the stockholders is liable to the trustee. *Jensen v. Kohler*..... 8
10. CORPORATIONS — WINDING UP — TRUSTEE'S ACTION — ISSUES — DEFENSES. An action by a trustee of a corporation to recover a collection, made by an attorney and divided among stockholders, does not involve the trustee's conduct in administering the trust, which can only be litigated in an action against the trustee for an accounting. *Jensen v. Kohler*..... 8
11. CORPORATIONS—DISSOLUTION ON INSOLVENCY—DISPOSITION OF ASSETS. Rem. 1915 Code, § 3715a, providing that a corporation whose name had been stricken for nonpayment of its license fees may hold a meeting of its stockholders and pass such resolutions as may be necessary to close out its affairs and wind up its business, modifies the former act, Rem. 1915 Code, § 3715d, providing that such a corporation is dissolved and the directors shall hold the property for the benefit of stockholders and creditors; and the stockholders may meet and dispose of all assets by a sale to another company assuming the indebtedness, in consideration of an exchange of its shares, and are not limited to the statutory procedure for a dissolution. *Grant v. Monterey Gold Mining Co.*..... 1
12. SAME—DISSOLUTION ON INSOLVENCY—SALE OF ASSETS — EXCHANGE OF STOCK—MINORITY STOCKHOLDERS—ASSENT. Minority stockholders of an insolvent corporation who assented or agreed to the acceptance of an exchange of stock in another corporation purchasing all the assets and assuming all the debts, cannot, two years later, be heard to object that the insolvent corporation had no power to wind up its affairs by such sale. *Grant v. Monterey Gold Mining Co.*..... 1

CORROBORATION:

Admissibility of letter to corroborate party, see EVIDENCE, 2.

COSTS:

On contest of will, see EXECUTORS AND ADMINISTRATORS, 2.

COURTS:

- Review of decisions, see **APPEAL AND ERROR**.
- Jurisdiction in bankruptcy, see **BANKRUPTCY**, 1.
- Review of appointing power in making selection of city employees, see **MUNICIPAL CORPORATIONS**, 3.
- Attendance at court as granting immunity to nonresident from service of process, see **PROCESS**.
- Province of court and jury, see **TRIAL**, 5, 6.
- Trial by court without jury, findings, see **TRIAL**, 11, 12.

CREDIBILITY:

- Of witnesses, see **WITNESSES**, 5, 6.

CREDITORS:

- See **BANKRUPTCY**.
- Conveyances in fraud of, see **FRAUDULENT CONVEYANCES**.
- Rights under conditional sales contracts, see **SALES**, 2.

CRIMINAL LAW:

- See **ADULTERY**; **CONSPIRACY**.
- Violation of jitney bus act, see **CARRIERS**, 1, 2.
- Violation of state wide prohibition law, see **INTOXICATING LIQUORS**.
- Practicing medicine without license, see **PHYSICIANS AND SURGEONS**.
- Conviction of crime as affecting credibility of witness, see **WITNESSES**, 5, 6.

1. **CRIMINAL LAW—RESPONSIBILITY OF AGENT—CARRIERS—MOTOR VEHICLES—VIOLATION OF STATUTE—CRIMINAL PROSECUTION.** Agents and employees of a corporation aiding and assisting in the operation of jitney busses without a permit in violation of the jitney bus act (Rem. 1915 Code, § 5562-37) are also equally guilty with the corporation of a violation of the statute, although only the company was required to take out the permit. *State v. Ferry Line Auto Bus Co.*..... 614
2. **CRIMINAL LAW—TRIAL—DISMISSAL—MOTION—SUFFICIENCY.** A motion to dismiss a criminal case upon the general ground of insufficiency of the evidence is bad, as there is no nonsuit in a criminal case; and is insufficient as a motion to direct a verdict of acquittal, since it fails to point out the particular matter as to which there was a failure of proof. *State v. Wheeler*..... 538
3. **CRIMINAL LAW—TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.** In a prosecution for adultery, it is an encroachment upon the province of the jury and reversible error to instruct, "if from the evidence of the opportunity and from other evidence of a disposition of the parties," etc., where there was no evidence of such disposition, etc., as it, in effect, tells the jury that there was direct evidence thereof, in the opinion of the court. *State v. Wheeler*..... 538

CUSTODY:

Of child, see **DIVORCE**.

CUSTOMS AND USAGES:

1. **CUSTOMS AND USAGES—CONTRACT FOR COMMISSIONS—RATE.** In the absence of evidence as to the rate of commissions to be paid on an exchange of personal property, the broker is entitled to recover such rate as was usually and customarily paid at the place in question. *Godefroy v. Hupp*..... 371

DAMAGES:

See **LIBEL AND SLANDER**, 2.

Attachment in action for, see **ATTACHMENT**, 1, 2.

To contractor for delay in performance of subcontract, see **CONTRACTS**, 3-7.

For wrongful death, see **DEATH**.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**.

For fraud, see **FRAUD**.

For breach of contract to buy logs, see **LOGS AND LOGGING**.

Claims for, see **MUNICIPAL CORPORATIONS**, 19.

To goods from break in water main, see **MUNICIPAL CORPORATIONS**, 29, 30.

Release of, see **RELEASE**.

For diversion of waters, see **WATERS AND WATER COURSES**, 13.

1. **DAMAGES — PERSONAL INJURIES — EXCESSIVE DAMAGES.** A verdict for \$3,600 for damages resulting from eating unwholesome meat sold by the defendant is not excessive, although plaintiff lost no great amount of time from his work, where it appears that it resulted in offensive uncontrollable diarrhea and recurrent spasms, and that his condition was permanent and progressive. *Flessner v. Carstens Packing Co.*..... 48
2. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$24,000 for personal injuries is so excessive as to indicate the influence of passion and prejudice, where plaintiff, 28 or 29 years of age, had the small bones of his hand broken, and received a gash over his eye, some injury to his ankles and knees of a temporary nature, and to the back of his head, impairment of eyesight, and temporary mental derangement, but was able to work at his usual wages in less than two months. *Roberts v. Pacific Telephone & Telegraph Co.*..... 274
3. **DAMAGES—ACTIONS—INSTRUCTIONS — INSANITY OF PLAINTIFF.** In an action for personal injuries alleged to have caused plaintiff's temporary insanity, brought by him as a competent person in his own name, the jury should be instructed they cannot find the plaintiff now insane, when, from his testimony, the jury might have found him insane at the time of the trial and thus enhanced his damages. *Roberts v. Pacific Telephone & Telegraph Co.*..... 274

DAMAGES—CONTINUED.

4. **SAME.** In such a case, it is error to instruct that insanity once established is presumed to continue until the contrary is shown, where that was contrary to the allegation of the complaint and would permit plaintiff to begin an action as a sane man and recover damages on the ground that he was insane. *Roberts v. Pacific Telephone & Telegraph Co.*..... 274
5. **SAME—EVIDENCE—INSANITY—COMMITMENT.** Upon an issue as to plaintiff's temporary insanity caused by injuries, his commitment to the state insane asylum, conformable to Rem. 1915 Code, § 5953, is admissible in evidence as to his insanity at that time. *Roberts v. Pacific Telephone & Telegraph Co.*..... 274
6. **SAME—INSTRUCTIONS—INSANITY.** In such case, an instruction as to the presumption of the continuance of insanity should be limited to the period of his confinement therefor, and the jury should be told that the commitment papers were not conclusive long prior to the time of the commitment. *Roberts v. Pacific Telephone & Telegraph Co.*..... 274

DEATH:

Of child entering elevator, see **CARRIERS**, 3.
 Proofs of death, see **INSURANCE**, 2.

1. **DEATH—DAMAGES—INFANT—EVIDENCE—ADMISSIBILITY.** In an action for the death of a minor child, evidence of the earning power of the child during minority is admissible. *Kranszuch v. Trustee Co.*..... 629
2. **DEATH—MEASURE OF DAMAGES—EXCESSIVE DAMAGES.** A verdict for \$3,576 for the wrongful death of a son, four years of age, will not be held excessive, in the absence of an affirmative showing of passion or prejudice; since substantial damages may be awarded. *Kranszuch v. Trustee Co.*..... 629

DEBT:

Attachment for, see **ATTACHMENT**.
 Corporate debts, liability of trustees, see **CORPORATIONS**, 7.
 Exemption from executions, see **EXEMPTIONS**.
 Conveyance of property in satisfaction of, see **FRAUDULENT CONVEYANCES**.
 Community debts, see **HUSBAND AND WIFE**, 3-6.
 Knowledge of as creating relation of trustee, see **TRUSTS**, 1.

DEBTOR AND CREDITOR:

See **FRAUDULENT CONVEYANCES**.

DECEDENTS:

Estates, see **DESCENT AND DISTRIBUTION**; **EXECUTORS AND ADMINISTRATORS**.
 Testimony as to transactions with, see **EVIDENCE**, 5; **WITNESSES**, 1-4.

DECISION:

Of city engineers as to payment for work under contract, see MUNICIPAL CORPORATIONS, 20.

DECLARATIONS:

As evidence in civil actions, see EVIDENCE, 1-3, 5.

DEDUCTION:

From taxes of real estate owned by bank, see TAXATION, 3-5.

DEEDS:

Acceptance of quitclaim deed by holder of note as releasing indorsers, see MORTGAGES, 2.

To state tide lands, see NAVIGABLE WATERS, 1, 2, 4.

Tax deeds, see TAXATION, 9.

Tender of water deed before action to enforce water lien, see WATERS AND WATER COURSES, 15.

1. **DEEDS—DELIVERY—INTENTION—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to show delivery of deeds of gift, in that no mutual intention presently to pass title was shown, where it appears that the grantor, in her last sickness, told her son that she was going to die, that in a box were two deeds, one for him and one for his wife, and requested that he take the box and "straighten up her affairs or her estate," giving no direction as to the deeds apart from the other contents of the box; and that the son had a key to the box. *Showalter v. Spangle*..... 326

DEFAULT:

In payments under conditional sales contract, see SALES, 5.

DEFICIENCY:

In foreclosure of mortgage, see CHATTEL MORTGAGES, 4.

DELAY:

In performance of contract, see CONTRACTS, 3-7.

DELEGATION:

Of powers to port district, see MUNICIPAL CORPORATIONS, 1.

DELIVERY:

Of deed, see DEEDS.

Sufficiency of delivery of goods under bill of sale by debtor given as security, see FRAUDULENT CONVEYANCES, 1.

DENIALS:

In pleading, see PLEADING, 1.

DEPOSITS:

Right of bank to set off deposits against debt of bankrupt, see **BANKRUPTCY**, 4.

Funds deposited in bank, see **TRUSTS**.

DESCENT AND DISTRIBUTION:

1. **DESCENT AND DISTRIBUTION—RIGHTS OF HEIRS—TITLE—STATUTES—ESTOPPEL.** The failure of heirs to complain of the omission of real estate from the inventory, does not estop them from claiming an interest as heirs, in view of Rem. 1915 Code, § 1366, whereby real estate descends to the heirs immediately on the death of the ancestor. *Showalter v. Spangle*..... 326

DIRECTING VERDICT:

Sufficiency of motion, see **CRIMINAL LAW**, 2.

DISABILITIES:

Effect on limitation, see **LIMITATION OF ACTIONS**.

DISCHARGE:

Of mortgage note, contract by subsequent purchasers, see **MORTGAGES**.

Of city employees, see **MUNICIPAL CORPORATIONS**, 2, 3.

Of claim for personal injuries, see **RELEASE**.

DISCLAIMER:

Dismissal of parties on disclaimer as affecting bar to second action, see **JUDGMENT**, 1.

DISCOUNT:

Bona fide purchasers at discount, amount of recovery on note, see **BILLS AND NOTES**, 11, 12.

DISCOVERY:

Of fraud, see **LIMITATION OF ACTIONS**, 3, 4.

1. **DISCOVERY—INTERROGATORIES — REFUSAL TO ANSWER — PENALTY — STATUTES—HARMLESS ERROR.** Under Rem. 1915 Code, § 1230, providing for the striking of the offending party's pleading for refusing to answer interrogatories and the rendition of judgment against him, it is not error to deny a motion for judgment at the trial for such refusal, where the moving party did not bring himself within the statute by moving to strike the pleading and the offending party was required to file an answer to the interrogatory before any evidence was introduced, and the failure to answer it earlier had no prejudicial effect. *Haas v. Washington Water Power Co.*..... 291

DISCRETION OF COURT:

Review of, see **APPEAL AND ERROR**, 20-22.

Competency of expert witness, see **EVIDENCE**, 12.

Amendments at trial, see **PLEADING**, 2.

Reopening case for further evidence, see **TRIAL**, 3, 4.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see **APPEAL AND ERROR**, 3, 5.

Dismissal on merits, as presenting question of fact on appeal, see **APPEAL AND ERROR**, 13.

Motion to dismiss for insufficiency of evidence, see **CRIMINAL LAW**, 2.

Dismissal of parties on disclaimer as affecting bar to second action, see **JUDGMENT**, 1.

At trial, see **TRIAL**, 7.

DISSIPATION:

Of trust funds, see **TRUSTS**, 2, 3.

DISSOLUTION:

Of attachment, see **ATTACHMENT**, 4.

Of corporation on insolvency, see **CORPORATIONS**, 11, 12.

DITCHES:

Irrigation ditches, see **WATERS AND WATER COURSES**, 6, 7, 11.

DIVERSION:

Of water course, see **WATERS AND WATER COURSES**, 13.

DIVIDENDS:

To creditors, see **BANKRUPTCY**, 2, 3.

DIVORCE:

1. **DIVORCE—CUSTODY OF CHILDREN—MODIFICATION—SUIT MONEY—ALLOWANCE AFTER DECREE.** Rem. 1915 Code, § 988, authorizing suit money pending an action for divorce, presupposes the existence of the marital relation; and after a divorce is granted, settling property rights and the custody of the child, the court cannot, upon the father's application for modification of the decree respecting the child's custody, require the payment of suit money and attorney's fees to aid the mother in her defense to the motion. *Dolby v. Dolby* 350

DOCUMENTS:

Secondary evidence, see **EVIDENCE**, 4, 5.

EASEMENTS:

Water rights, see **WATERS AND WATER COURSES**, 11, 17.

EJECTMENT:

1. **EJECTMENT—BETTERMENTS—STATUTES—ADVERSE POSSESSION—GOVERNMENT LAND.** In ejectment, there can be no allowance for betterments placed on the land while the title was in the United States, under Rem. 1915 Code, § 797, authorizing a counterclaim for the value of permanent improvements made and taxes paid by a defendant holding in good faith under color or claim of title adversely to

EJECTMENT—CONTINUED.

the claim of plaintiff; since there can be no adverse holding against the United States. *Skinner v. McOrackan*..... 43

2. **SAME—BETTERMENTS—TAXES—IMPROVEMENTS.** Such act authorizes a counterclaim for taxes paid which became a lien on the land subsequent to the issuance of a patent therefor; and for a pipe line which was a permanent improvement to the land. *Skinner v. McOrackan* 43

ELECTION:

As terminating appointee's term to fill vacancy, see JUDGES, 1.

ELECTION OF REMEDIES:

1. **ELECTION OF REMEDIES—MASTER AND SERVANT—ACTIONS—FEDERAL STATUTES.** Where plaintiff sued for personal injuries under the Federal employers' liability act, and resisted a removal of the case to the Federal court upon his right to sue in the state court under the Federal act, he elected as between a right of action at common law and under the Federal act, and must abide by his election as fixing the law of the case. *Killes v. Great Northern R. Co.*..... 416

ELECTIONS:

1. **ELECTIONS—PRIMARY ELECTIONS—NOMINATIONS—OFFICE—JUDGES—SHORT TERM—DESIGNATION ON BALLOT—STICKERS—STATUTES.** The primary election law being an exclusive means of selecting candidates and not an essential part of the general election law, and the auditor not being required to prepare a ballot for unexpired terms unless there is a filing therefor, a person cannot be nominated for an unexpired term of judge of the superior court by the use of stickers or the writing of names on the primary election ballot, where there has been no filing for such unexpired term and hence no notice to electors of such an office to be filled, as contemplated by Rem. 1915 Code, § 4843, requiring publication thereof; especially in view of Id., 4842, which provides that, where there is a vacancy to be filled, candidates may announce themselves for either the long or short term and the ballots "shall be arranged accordingly;" since no elector may assume to use the ballot for the selection of a candidate for an office not designated on the ballot and for which no voting arrangement is made; and stickers may be used under Id., § 4843, only for offices designated on the ballot. *State ex rel. Sears v. Gilliam*..... 248
2. **ELECTIONS—PRIMARY ELECTIONS—NOMINATIONS—"CONTEST"—TIME FOR FILING—STATUTES.** Under Rem. 1915 Code, § 4829, providing for the correction of any error or wrong in the placing of names on the primary election ballot or the failure or neglect of any duty by any election official, upon the filing of an affidavit in the supreme or any superior court, and that any candidate who may desire to contest the nomination of any candidate may proceed by such affidavit so pre-

ELECTIONS—CONTINUED.

sented, provided the affidavit is presented within five days after completion of the canvass of the votes and not later, a proceeding in mandamus to require the secretary of state to certify the name of a candidate along with the names of several other candidates who admittedly received the requisite number of votes to go upon the ballot, is a "contest" of the nomination, and must be commenced within the five days limited, or it is too late. *State ex rel. Mills v. Howell* 257

ELECTRICITY:

1. **ELECTRICITY—ACTION FOR DAMAGES—NEGLIGENT CONSTRUCTION—EVIDENCE—STATUTES.** Compliance with Rem. 1915 Code, § 4976-1, prescribing certain rules for the construction of electrical lines, is not evidence of proper construction except in the particulars covered by the statute; and does not cover the necessity of using lightning arresters over transformers on poles carrying high voltage wires so as to prevent excessive current entering premises on distribution lines in case of a stroke of lightning. *Haas v. Washington Water Power Co.*..... 291
2. **ELECTRICITY—ACTIONS FOR INJURIES—ELECTRIC SHOCK—PROXIMATE CAUSE—QUESTION FOR JURY.** In an action for injuries sustained through an electric shock, shortly after a stroke of lightning had broken defendant's high voltage transmission wires, whether the injury was caused by the act of the defendant in again charging the wires shortly after the shock, is for the jury, where experts expressed the view that a wet cross arm, upon which the broken wire rested, was a sufficient conductor to carry the excessive charge over the distribution wires to plaintiff's house and cause plaintiff's injury, although the same was disputed and there was vague evidence of a second stroke of lightning. *Haas v. Washington Water Power Co.*..... 291
3. **SAME—ACTION FOR INJURIES—ELECTRIC SHOCK—NEGLIGENCE—QUESTION FOR JURY.** In an action for injuries through receiving an electric shock, after a break in the defendant's high voltage line, when defendant again turned on the current to test out the line, the negligence of the defendant is a question for the jury, where all the experts testified that the only practicable method of locating the trouble was to turn on about one-half of the normal voltage, and defendant's witness in charge of the power house, who was the only person who could testify on the subject, contradicted himself, first testifying that he turned on the full voltage and repeated it on cross-examination, but finally reduced it to less than half the normal voltage; especially where the defendant's answer to an interrogatory showed that the line was charged with normal voltage. *Haas v. Washington Water Power Co.*..... 291

ELEVATORS:

Negligence in operation of, see **CARRIERS**, 3.

Injury to servant from use of automatic elevator, see **MASTER AND SERVANT**, 3-5, 7, 8.

ELIGIBILITY:

Of candidate for office of superior judge, see **JUDGES**, 2.

EMINENT DOMAIN:

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**, 9.

1. **EMINENT DOMAIN — TAKING OR "DAMAGING" OF PRIVATE PROPERTY — COMPENSATION — GARBAGE PLANTS.** The erection and maintenance by a city of an incinerator for the burning of garbage on land adjacent to that of a private owner in such manner as to depreciate the value of his land and render it a menace to health, constitutes a "damaging of private property for a public use," within Const., art. 1, § 16, forbidding such damaging without first making compensation therefor, when the damage did not result from any negligence of the city, even though the operation of such a plant is a proper governmental function granted by legislative act. *Jacobs v. Seattle* 171
1. **SAME — "DAMAGING PROPERTY" — MUNICIPAL CORPORATIONS — NUISANCE — LIABILITY FOR NEGLIGENCE.** Rem. 1915 Code, § 8005, authorizing the installation of plants for the disposal of garbage and Id., § 8311, providing that nothing done or maintained under the express authority of statute can be deemed a nuisance, does not defeat recovery for damaging private property without just compensation by the erection and maintenance of a garbage plant, although the city is not liable on the theory of tort for negligent operation in such manner as to create a nuisance. *Jacobs v. Seattle* 171
3. **EMINENT DOMAIN — COMPENSATION BEFORE TAKING — WAIVER — INJUNCTION — REMEDY IN DAMAGES.** Where by consent entry upon land was made for the construction of a railroad under a verbal agreement as to the compensation, and the grade was completed and the right of way fenced off, with no steps taken to recover possession for two years, the owner waived his constitutional right to compensation in advance; hence injunction does not lie to restrain further work until compensation is made, but the owner is relegated to his action in damages. *State ex rel. Twiss v. Superior Court* 429

EMPLOYEES:

See **MASTER AND SERVANT**.

EMPLOYERS' LIABILITY ACT:

See **COMMERCE; ELECTION OF REMEDIES**.

EMPLOYMENT AGENCIES:

- Regulation of as exercise of police power, see CONSTITUTIONAL LAW, 4.
- Construction of employment agency law, see STATUTES, 2, 3.

ENGINEERS:

- Conclusiveness of decisions as to payment for work under city contract, see MUNICIPAL CORPORATIONS, 20.

EQUITY:

- See CANCELLATION OF INSTRUMENTS; FRAUDULENT CONVEYANCES; TRUSTS.
- Equitable estoppel, see ESTOPPEL.
- Jury trial in equitable actions, see JURY.
- Relief from speculative contract, see MINES AND MINERALS, 6.
- Findings in equitable case, see TRIAL, 11, 12.
- Enjoining interference with water rights for irrigation, see WATERS AND WATER COURSES, 16, 17.
- 1. EQUITY—MAXIMS. A small item of \$11.80 interest on a repair bill, that possibly was offset against other items involved, may be disregarded on the principle of *de minimus non curat lex*. *Breaks v. Spokane Auto Co.*..... 143

ESTABLISHMENT:

- Of boundary, see BOUNDARIES.
- Of city street, adverse use, see MUNICIPAL CORPORATIONS, 24.
- Of harbor lines, see NAVIGABLE WATERS, 4-8.

ESTATES:

- Decedents' estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

- Of stockholders to claim fraud in receivership and sale of assets, see CORPORATIONS, 8.
- Of stockholders to object to sale of assets on insolvency, see CORPORATIONS, 12.
- To claim interest as heirs, see DESCENT AND DISTRIBUTION.
- By judgment, see JUDGMENT.
- To assert want of consideration on purchase of invention, see PATENTS, 2.
- 1. ESTOPPEL—IN PAIS—SILENCE—PREJUDICE. An estoppel to object to an increased charge for water used under a mining contract, upon changing to the hydraulic method, is not created by silence following the rendering of a statement of the profits showing the increased charges, where the statement was not rendered until more than half of all the expense had been incurred for high pressure water, and

ESTOPPEL—CONTINUED.

- under the contract there was no right to make such increased charge; since the silence did not actually mislead the other party or operate as a fraud. *Blanck v. Pioneer Mining Co.*..... 26
2. **SAME—BURDEN OF PROOF.** The burden of proving that silence, to create an estoppel operated as a fraud or was intended to mislead and would be acted upon, is upon the party invoking the estoppel. *Blanck v. Pioneer Mining Co.*..... 26

EVIDENCE:

- See **BROKERS**, 3; **DISCOVERY**; **FACTORS**; **FRAUDULENT CONVEYANCES**, 2.
- Of marriage, sufficiency, see **ADULTERY**.
- Incorporation in record on appeal, see **APPEAL AND ERROR**, 5-7, 8.
- Waiver of error on appeal, see **APPEAL AND ERROR**, 16.
- Parol evidence to explain writing, see **BANKRUPTCY**, 2.
- Parol evidence to vary writing, see **BILLS AND NOTES**, 4.
- Of *bona fides* in purchase of note, see **BILLS AND NOTES**, 8, 9.
- To show failure of consideration for note, see **BILLS AND NOTES**, 13.
- Establishment of boundary, see **BOUNDARIES**, 1-3.
- Of fraud in procurement of contract, see **CANCELLATION OF INSTRUMENTS**.
- For personal injuries to passenger, see **CARRIERS**, 3.
- Of fraudulent conspiracy, see **CONSPIRACY**.
- For breach of contract, see **CONTRACTS**, 6.
- Fraud in payment for stock issued, see **CORPORATIONS**, 1.
- Of fraud in sale of stock, see **CORPORATIONS**, 2, 3.
- In action for damages for personal injuries, see **DAMAGES**, 5.
- In action for wrongful death, see **DEATH**, 1.
- Of intent to deliver deeds of gift, see **DEEDS**.
- Negligent construction in electrical system, see **ELECTRICITY**, 1.
- Of intent of parties, see **FIXTURES**, 4, 5.
- Presumptions as to trade fixtures, see **FIXTURES**, 6.
- To show executed oral contract, see **FRAUDS, STATUTE OF**, 2.
- Separate character of property, see **HUSBAND AND WIFE**, 2, 7.
- Proof of intoxicating qualities of liquor sold under state wide prohibition law, see **INTOXICATING LIQUORS**, 6.
- In action for publication of libel, see **LIBEL AND SLANDER**, 2.
- In action for damages for breach of contract to buy logs, see **LOGS AND LOGGING**, 2.
- For injuries to servant in general, see **MASTER AND SERVANT**, 4, 6, 9-13.
- For personal injuries on city street, see **MUNICIPAL CORPORATIONS**, 25, 27.
- To show status as licensee or invitee, see **NEGLIGENCE**, 1.
- Newly discovered ground for new trial, see **NEW TRIAL**, 2, 3.
- Partnership relation, see **PARTNERSHIP**.
- Agency, see **PRINCIPAL AND AGENT**.
- Of fraud inducing release of damages, see **RELEASE**, 1.

EVIDENCE—CONTINUED.

Stipulations as to evidence, see STIPULATIONS.

In action to secure deduction from taxes of value of real estate owned by bank, see TAXATION, 3.

Of waiver of legal tender, see TENDER.

Reception at trial, see TRIAL, 1, 2.

As question of law for court, see TRIAL, 5.

Questions of fact for jury, see TRIAL, 5-7.

Of unappropriated character of government land, see WATERS AND WATER COURSES, 3.

Damages for diversion of water, see WATERS AND WATER COURSES, 13.

Testimony of witnesses, see WITNESSES.

1. EVIDENCE—SELF-SERVING DECLARATIONS—OFFER OF COMPROMISE. A party cannot offer in evidence a letter written by him which was a self-serving declarations on the subject in controversy and an offer of compromise, where it was not necessary to prove a demand and it was not in reply to the opposite party. *Munson v. Baldwin*..... 36
2. SAME. Such a letter would not be admissible for the purpose of corroborating the party. *Munson v. Baldwin*..... 36
3. EVIDENCE—DECLARATIONS OF INSURED — ADMISSION AGAINST BENEFICIARY. The declaration of the insured as to his age are, in actions upon mutual benefit insurance, admissible against the beneficiary. *Armstrong v. Modern Woodmen of America*..... 352
4. EVIDENCE—HEARSAY EVIDENCE—RECITALS IN RECORDS OF MARRIAGE LICENSE—FACT OF AGE. Where, by the statute of a sister state, the recorder had no right to issue a marriage license to a male person under twenty-one without the consent provided for and it was his duty to make a record of the fact, a certified copy of a marriage license, tending to support a claim that an insured person was then over twenty-one years of age, is admissible in evidence upon the question of his age, for what it was worth, constituting a recognized exception to the hearsay rule. *Armstrong v. Modern Woodmen of America*..... 352
5. EVIDENCE—DOCUMENTARY EVIDENCE — BOOKS OF ACCOUNT—"SHOP — BOOK"—"TRANSACTION WITH PERSON SINCE DECEASED." An account book, kept by defendant, a business man, showing only sums paid by him to plaintiff's decedent at various dates, apparently all entered at the same time, and not kept in the ordinary course of defendant's business, is not a "shop-book," and is inadmissible, as it appears on its face to be a self-serving declaration, and an attempt to evade the statute excluding testimony of transactions had with the deceased. *Goldsworthy v. Oliver*..... 67
6. EVIDENCE—PAROL TO VARY WRITING — SUFFICIENCY — MINING CONTRACT. An oral modification of a mining contract with reference to the amount to be charged for water is not established where evidence of notice of the change was vague and contradicted and the other

EVIDENCE—CONTINUED.

parties to the contract never agreed to pay the higher charge.
Blanck v. Pioneer Mining Co...... 26

7. EVIDENCE—PAROL TO VARY WRITING. An unambiguous written contract to purchase stock in a corporation in consideration of the completion of a theater building upon certain plans and specifications, cannot be varied by parol evidence to the effect that the cost of the building was represented to be \$75,000, and in fact was only \$36,379.
Eggleston v. Pantages..... 221
8. EVIDENCE—PAROL—TO VARY WRITING—LEASE—CONTEMPORANEOUS WARRANTY. Where a written lease of hotel property is complete in itself, a prior or contemporaneous oral warranty as to the water in a well on the leased premises cannot be shown. *Grubb v. House*.. 200
9. EVIDENCE—PAROL—TO VARY WRITING—DIFFERENT CONSIDERATION—FRAUDS, STATUTE OF. Where a lease of a hotel building for a five-year term was unacknowledged, it is inadmissible to show by parol, as an additional consideration for the full term, that the lessees, hotelmen of reputation, agreed to build up a patronage from which no revenue was expected at first; since no consideration was paid that went to the entire term, no recognition of the lease was made within one year prior to its expiration, and no permanent improvement was made by the lessee; and in such case it is inadmissible to show by parol a different consideration that modifies the legal effect of the lease. *Grubb v. House*..... 200
10. EVIDENCE—PAROL TO VARY WRITING—WAIVER—OF LEGAL TENDER. A waiver of legal tender of the contract price to be paid for wheat affects only the mode of payment and hence is not inadmissible as varying the terms of the written contract. *Wallace v. Babcock*.. 392
11. EVIDENCE—OPINION EVIDENCE—HEARSAY. The opinion evidence of physicians as to the cause of plaintiff's sickness is not objectionable as hearsay because based in part upon the history of the case detailed to them by the patient, where it was necessary to take into consideration both the subjective and objective symptoms. *Flessner v. Carstens Packing Co.*..... 48
12. EVIDENCE—OPINION EVIDENCE—EXPERTS—QUALIFICATION—ADMISSIBILITY. Upon an issue as to the earning power of a minor child, the qualification of the witness to testify as an expert as to the cost of rearing and educating the child is largely a matter of discretion, and the ruling will not be disturbed except for manifest abuse of discretion. *Kranszuch v. Trustee Co.*..... 629

EXAMINATION:

Of expert witnesses, see EVIDENCE, 11, 12.

Of witnesses in general, see WITNESSES.

EXCEPTIONS:

To advisory report of commissioners in reestablishing lost boundary line, see BOUNDARIES, 4.

EXCESSIVE DAMAGES:

See DAMAGES, 1, 2.

For wrongful death of child, see DEATH, 2.

EXCESSIVE FEES:

Remedy for adjustment of excessive attorney's fees, see ATTORNEY AND CLIENT, 2.

EXCESSIVE TAX:

See TAXATION, 6-8.

EXCHANGE OF PROPERTY:

See BROKERS.

Rate of broker's commission, see CUSTOMS AND USAGES.

Measure of damages for fraud inducing trade, see FRAUD.

EXCHANGE OF STOCK:

On dissolution of insolvent corporation, see CORPORATIONS, 12.

EXECUTION:

Exemptions, see EXEMPTIONS.

EXECUTORS AND ADMINISTRATORS:

Testimony as to transactions with decedents, see WITNESSES, 1-4.

1. **EXECUTORS AND ADMINISTRATORS—ACTIONS—REAL ESTATE—RIGHT TO SUE—QUIETING TITLE.** The administrator may sue to quiet title to water for irrigating the lands of the estate and for injunctive relief, notwithstanding Rem. Code, §§ 1341-1366 vest title in the heirs immediately upon the death of the ancestor; since the administrator has the right of possession. *Wendler v. Woodard*..... 684
2. **EXECUTORS AND ADMINISTRATORS—CONTEST OF WILL—COSTS—RES JUDICATA.** Where, on the contest of a will, the court, on application, refused to tax the costs of the appeal to the losing party, the judgment is conclusive of the matter, and the executrix cannot retry the matter on final accounting by asking that the costs be offset against the losing party's share of the estate. *In re Brown's Estate*..... 324

EXEMPTIONS:

1. **EXEMPTIONS—LIFE INSURANCE—PROCEEDS—EXEMPTION FROM DEBTS—STATUTES.** Construed together as *in part materia* with Rem. 1915 Code, § 569, Rem. & Bal. Code, § 6158, providing that, if a policy of insurance is effected by any person on his own life, the lawful beneficiary thereof, other than himself or his legal representatives, shall, unless contrary to the terms of the policy, be entitled to its proceeds against the creditors, was intended to modify the sweeping provisions of § 569, providing that the proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt; hence, to claim the exemption, the insurance must be payable to

EXEMPTIONS—CONTINUED.

- some beneficiary "other than the assured or his legal representatives." *Elsom v. Gadd*..... 603
2. **SAME—STATUTES—REPEAL—SUBJECT-MATTER.** The repealing clause of the Insurance Code, Laws 1911, p. 298, § 238, repealing all prior acts "on the subject of the organization and government of insurance companies and insurance business," was not intended to repeal the earlier act, Rem. 1915 Code, § 569, exempting the proceeds or avails of all life and accident insurance from liability for any debt; the subject-matter of exemptions being a distinct subject-matter in and of itself not necessarily included within an act relating to insurance. *Elsom v. Gadd*..... 603
3. **EXEMPTIONS—WAIVER—TIME FOR FILING CLAIM.** A claim for exemptions from execution is not waived by a request to postpone the sale in the hope of paying the judgment, when the claim was filed as required by statute within a reasonable time before sale. *Shell v. Svennson* 40
4. **SAME—CLAIM—FILING—RELEASE OF PROPERTY.** Upon filing a claim for exemptions from execution due to a householder and farmer, it is the duty of the sheriff to release the property where no appraisal was demanded, as provided in Rem. 1915 Code, § 573. *Shell v. Svennson* 40

EXHIBITS:

As part of record on appeal, see **APPEAL AND ERROR**, 9.

EXPERT TESTIMONY:

In civil actions, see **EVIDENCE**, 11, 12.

EXPLOSIVES:

Negligence in failure to warn employee of dangers, see **MASTER AND SERVANT**, 6.

EXTENSION:

Of outer boundary of tide and shore lands, see **NAVIGABLE WATERS**, 1, 3.

EXTRA WORK:

Action to recover for on city contract, see **MUNICIPAL CORPORATIONS**, 18, 19.

FACTORS:

1. **FACTORS—AUTHORITY—EMPLOYING SUBAGENTS.** A factor operating under an express contract to market fruit for a commission has no power to employ subagents at the owner's expense and deduct their commissions, and the power is not implied from the mere fact of employment. *Sherwood Brothers, Incorporated, v. Seattle Fruit & Produce Auction Co.*..... 544

FACTORS—CONTINUED.

2. **FACTORS—COMMISSIONS—CONTRACT—EVIDENCE—FINDINGS.** Where parties disagree as to the terms of a special contract for the sale of goods on commission, the fact that the court did not find the contract exactly as claimed by either party, but adopted the testimony of each in part, does not amount to a finding that there was no meeting of the minds upon any definite contract. *Sherwood Brothers, Incorporated, v. Seattle Fruit & Produce Auction Co.*..... 544
3. **SAME—COMMISSIONS—CONTRACT—EVIDENCE—SUFFICIENCY.** Findings that fruit was to be marketed for a specified commission, without deductions for the commissions of subagents in the east, are sustained where that version of the contract was corroborated by the fact that the amount of such deductions was not agreed upon when the contract was made, and that both the fact and the amount of the deductions made were persistently concealed in making statements of all the other expenses incurred. *Sherwood Brothers, Incorporated, v. Seattle Fruit & Produce Auction Co.*..... 544

FEES:

- Of attorney, see **ATTORNEY AND CLIENT.**
- Allowance of attorney's fees, priority of claim, see **BANKRUPTCY, 8.**
- Of trustee, waiver of objections to, see **BANKRUPTCY, 9.**

FELLOW SERVANTS:

- See **MASTER AND SERVANT, 1, 7.**

FIELD NOTES:

- To locate boundary line, see **BOUNDARIES, 2.**

FILING:

- Time for filing contest of nomination, see **ELECTIONS, 2.**
- Claims for exemptions, see **EXEMPTIONS, 3, 4.**
- Claim against contractor's bond, see **MUNICIPAL CORPORATIONS, 12.**

FINDINGS:

- Review in absence of findings, see **APPEAL AND ERROR, 23, 24.**
- Review on appeal, see **APPEAL AND ERROR, 25, 26.**
- As to fact of marriage, sufficiency, see **MARRIAGE.**
- As to assignment of city contract, sufficiency, see **MUNICIPAL CORPORATIONS, 11.**
- By court in civil actions, see **TRIAL, 11, 12.**

FIRE INSURANCE:

- See **INSURANCE, 1.**

FIREMAN'S PENSIONS:

- See **MUNICIPAL CORPORATIONS, 4-6.**

FIXTURES:

1. **FIXTURES—LANDLORD AND TENANT—TRADE FIXTURES.** Under a fifteen-year lease of premises upon which the lessee agreed to erect a theater building to cost not less than a certain sum, and to pay a fixed rental for the term, the usual furnishings, which were not mentioned in the lease, such as removable electric fixtures, opera chairs, picture machines and screen, carpets and furnishings for the ladies' dressing room, of a perishable nature, are not fixtures. *Ballard v. Alaska Theatre Co.*..... 655
2. **SAME.** A clause in such a lease requiring the lessee to yield up the premises in a "good tenantable condition" does not contemplate that the building should be furnished for any particular purpose, so as to make such furnishings fixtures. *Ballard v. Alaska Theatre Co.* 655
3. **SAME.** The fact that the building was constructed for a particular purpose and specially to receive the very furnishings installed, which were suitable only for this particular building or type of building, does not make the furnishings fixtures. *Ballard v. Alaska Theatre Co.*..... 655
4. **SAME—LANDLORD AND TENANT—TRADE FIXTURES—INTENT—EVIDENCE.** Whether fixtures become part of the freehold or are trade fixtures, removable by the tenant, depends upon the intent of the parties, to be inferred, when not determined by express agreement, from the nature of the article affixed, the relation and situation of the freehold after annexation, the manner and purpose of the annexation, considered in the light of the ordinary rules applicable to landlord and tenant. *Ballard v. Alaska Theatre Co.*..... 655
5. **SAME—ANNEXATION—PRESUMPTIONS.** As between landlord and tenant, the presumption is that the tenant did not intend to enrich the freehold by annexing fixtures. *Ballard v. Alaska Theatre Co.* 655
6. **SAME—LANDLORD AND TENANT—TRADE FIXTURES—ANNEXATION—REMOVAL—EVIDENCE.** Opera chairs and a vacuum cleaner, placed in a theater building by a tenant, and purchased under conditional sales contracts, are not fixtures that become part of the freehold, in view of the presumption that they are trade fixtures. *Ballard v. Alaska Theatre Co.*..... 655
7. **SAME.** The same is true of a pipe organ manufactured and installed by the tenant after the building was completed, although to remove it requires the tearing away of parts of partition walls that were taken out in order to receive it, where no material injury to the building would ensue; and the same is true of other fittings the removal of which would work no material injury to the building. *Ballard v. Alaska Theatre Co.*..... 655

FOOD:

1. **FOOD—SALES—IMPLIED WARRANTY—ACTIONS—PLEADING—NEGLIGENCE.** An action on the case as for a tort lies for breach of the

FOOD—CONTINUED.

implied warranty of the wholesomeness of immediate human consumption; and in facts, it is not necessary to allege the legal liability of the defendant in *Flesscher v. Carstens Packing Co.*.....

2. **SAME—PLEADING SCIENTER.** In an action for breach of the implied warranty of the wholesomeness of food for human consumption by a retailer who was also the manufacturer, it is not necessary to allege or prove scienter, but the retailer must be called on on warranty or of negligence. *Flesscher v. Carstens Packing Co.*.....

3. **SAME—LIABILITY FOR INJURIES—QUESTION OF FACT.** The question of the liability of a retailer and manufacturer of dried human consumption, is a question for the trier of fact. The evidence that plaintiff and others eating the meat soon after purchasing it became ill, that plaintiff's illness was, in their opinion, caused by some condition of the meat, notwithstanding the fact that other parts cut from the same meat were not eaten. *Flesscher v. Carstens Packing Co.*.....

FORECLOSURE:

Of mortgage, see **CHATTEL MORTGAGES**, 4.
Judgment foreclosing chattel mortgage as to mortgagor, see **JUDGMENT**, 1.

Of lien, see **MECHANICS' LIENS**.

Of mortgage lien on default in payments, see **WATERS AND WATER COURSES**, 14, 15.

FOREIGN LAWS:

Stipulations as to, see **STIPULATIONS**.

Province of court and jury, see **TRIAL**, 5.

FORFEITURE:

Of conditional sales contract, see **SALES**, 6.

FORMER ADJUDICATION:

See **JUDGMENT**.

FRAUD:

See **BILLS AND NOTES**, 8; **FRAUDULENT CONVEYANCES**.

In procurement of contract, see **CANCELLATION OF CONTRACTS**.
Conspiracy to defraud, see **CONSPIRACY**.

In procuring subscription to stock, see **CO**.

In sale of stock, see **CORPORATIONS**, 2, 3.

In receivership and sale of assets of insolvent corporation, see **CORPORATIONS**, 8.

Judgment as bar to second action, see **JUDGMENT**.

FRAUD—CONTINUED.

Bar of action for relief on ground of fraud, see **LIMITATION OF ACTIONS**, 3, 4.

To overcome release of damages, see **RELEASE**, 1.

1. **FRAUD—ACTION—MEASURE OF DAMAGES.** The measure of damages for fraud inducing a trade of plaintiffs' equity in certain lots must be based upon the market value of the plaintiffs' equity in the lots, and not upon the market value of the lots. *Bouckaert v. Burwell & Morford, Incorporated* 88

FRAUDS, STATUTE OF:

Previous oral agreement as to mode of payment as varying indorsement of note, see **BILLS AND NOTES**, 4.

Contract for commission, see **BROKERS**, 1, 2.

Parol evidence to show different consideration for unacknowledged lease, see **EVIDENCE**, 9.

1. **FRAUDS, STATUTE OF—LEASE—PERMANENT IMPROVEMENTS—GOOD WILL.** The good will of a lessee's hotel business does not operate as a permanent improvement by the lessee so as to remove the bar of the statute of frauds as to an unacknowledged lease for five years. *Grubb v. House* 200
2. **FRAUDS, STATUTE OF—SALES—EXECUTED ORAL CONTRACT—EVIDENCE—SUFFICIENCY.** Where parties negotiated for a written contract for the sale of logs and failed to make a formal writing, but entered upon performance and logs were cut and delivered and paid for at the price apparently agreed upon, the courts will treat the contract as an executed oral contract, and the jury is warranted in finding a binding contract to sell and to buy. *Hughes v. Eastern R. & Lumber Co.* 558

FRAUDULENT CONVEYANCES:

1. **FRAUDULENT CONVEYANCES—PREFERENCES—BILL OF SALE—DELIVERY—CHANGE OF POSSESSION.** Under a bill of sale by a debtor given as security, there is a sufficient delivery or change of possession of lumber piled in the vendor's yards, as against a subsequent assignee for creditors, where the vendee's agent came to the yard, looked it over with the vendor, who agreed he might take it, and the agent employed a man to take and haul it away. *Haskins v. Fidelity National Bank* 63
2. **FRAUDULENT CONVEYANCES—PREFERENCES—DEBT—BONA FIDES—EVIDENCE—SUFFICIENCY.** In an action to set aside conveyances by a judgment debtor to his mother as fraudulent as to creditors, upon an issue as to whether the conveyances were a lawful preference on a *bona fide* debt, vague and indefinite testimony as to events recently occurring and which if true could have been easily corroborated by clear and convincing evidence, but were not, is insufficient to overcome positive evidence that the grantor had paid a large portion of

FRAUDULENT CONVEYANCES—CONTINUED.

the debt by borrowing money at a bank and paid for the land by giving his own check in part payment of the debt to his mother.
Union Securities Co. v. Smith..... 115

3. **SAME—PREFERENCES—FICTITIOUS DEBT—EFFECT.** While a debtor may prefer one of his creditors, even with the knowledge that it will hinder other creditors, the debt must be real and not exaggerated; hence, regardless of the rule that the property transferred must bear a reasonable proportion to the preferred debt, any security for a sum in excess of what is actually due is presumptively fraudulent, and vitiates the transfer as against creditors, not only as to the fictitious part, but *in toto*. *Union Securities Co. v. Smith* 115
4. **SAME—ACTIONS—SUBJECTING LAND TO JUDGMENT—AMOUNT.** In an action to subject property fraudulently transferred to the lien of a judgment, any sum paid by a joint judgment debtor must be credited on the judgment. *Union Securities Co. v. Smith*..... 115

FUNDS:

Of port district, disbursement of, see **MUNICIPAL CORPORATIONS**, 1.
 Local improvement funds, liability of city treasurer's successor, see **MUNICIPAL CORPORATIONS**, 31.
 Commingling trust funds, see **TRUSTS**, 2-4.

GARNISHMENT:

Of bank on blended account of trustee, see **TRUSTS**, 2, 3.

GAS:

See **MINES AND MINERALS**, 1-3.

GIFTS:

Of stock to corporation, see **CORPORATIONS**, 4.
 Intent to deliver deeds, see **DEEDS**.
 To wife from husband, see **HUSBAND AND WIFE**, 2.

GOOD FAITH:

Of purchaser, see **BILLS AND NOTES**, 8-10.
 Affidavit of accompanying mortgage, see **CHATTEL MORTGAGES**, 2, 3.

GOOD WILL:

Of lessee's business as permanent improvement removing bar of statute as to unacknowledged lease, see **FRAUDS, STATUTE OF**, 1.

GRANTS:

To state as subject to vested right to water for irrigation, see **WATERS AND WATER COURSES**, 2.

HARBOR AREA:

Establishment of, see **NAVIGABLE WATERS**, 4-8.

HARMLESS ERROR:

In civil actions, see **APPEAL AND ERROR**, 27-34.

HEARSAY EVIDENCE:

In civil actions, see **EVIDENCE**, 4, 11.

HEIRS:

See **DESCENT AND DISTRIBUTION**.

HUSBAND AND WIFE:

See **DIVORCE**; **MARRIAGE**.

Adultery, see **ADULTERY**.

Attachment upon community property, parties, see **ATTACHMENT**, 3.

1. **HUSBAND AND WIFE—SEPARATE PROPERTY—ORAL AGREEMENTS AFTER MARRIAGE—VALIDITY.** An oral agreement between husband and wife after marriage that property inherited by the wife and whatever she acquired should be hers and go to her children upon her death and that whatever he acquired and his personal earnings should be his and go to his children by a former marriage, continuously acted upon, is valid and makes the property the separate estate of each. *Union Securities Co. v. Smith*..... 115
2. **HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—GIFTS—EVIDENCE—SUFFICIENCY.** A finding that a player piano and music was the separate property of the wife is sustained by testimony of the wife that the same were gifts from her husband, who permitted her to treat it as her own, where there was no evidence to the contrary. *Chase & Baker Co. v. Olmsted*..... 306
3. **HUSBAND AND WIFE—COMMUNITY PROPERTY—BOND OF HUSBAND.** Where a husband, holding stock as community property, executed a bond to secure the indebtedness of the company, the bond is a community debt. *Union Securities Co. v. Smith*..... 115
4. **SAME—COMMUNITY OR SEPARATE DEBT—BOND OF HUSBAND.** Where a husband purchased corporate stock with his separate estate, and signed a bond as a stockholder for the benefit of the corporation, the bond is not a community debt. *Union Securities Co. v. Smith* 115
5. **HUSBAND AND WIFE—COMMUNITY PROPERTY—JOINT NOTE—SEPARATE PROPERTY OF WIFE—IMPROVEMENT—COMMUNITY DEBT.** Money borrowed by the note of husband and wife, secured by mortgage on his wife's separate property, and used in the payment of taxes and the preservation of such property, is not a community fund, and does not give the community any interest in the land which could be subjected to the lien of a community judgment; in view of Rem. 1915 Code, §§ 5915-5917, defining separate and community property, placing the latter under the control of the husband, and providing that the wife's separate property shall not be subject to the debts or contracts of the husband, but only to her control in the same manner

HUSBAND AND WIFE—CONTINUED.

that the husband controls property belonging to him. *Graves v. Columbia Underwriters* 196

6. **HUSBAND AND WIFE—COMMUNITY DEBT—LIABILITY OF WIFE.** The wife is not personally liable upon a contract by her husband to pay a commission for the exchange of personal property belonging to himself and the community. *Godefroy v. Hupp*..... 371

7. **SAME—COMMUNITY PROPERTY—PRESUMPTION—PURCHASE WITH WIFE'S SEPARATE FUNDS—EVIDENCE.** Although the purchase price of land was raised by the giving of joint notes and two mortgages by two communities, creating the presumption that the land purchased was the community property of both communities, an undivided one-half thereof will be held the separate property of one of the wives, where her separate property discharged one-half of the obligations and her husband contributed nothing to the purchase. *Union Securities Co. v. Smith*..... 115

IDENTITY:

Of issues as ground for plea in abatement, see **ABATEMENT AND REVIVAL**.

IMPAIRMENT:

Of capital stock, see **CORPORATIONS**, 4.

IMPLIED TRUSTS:

See **TRUSTS**, 1.

IMPROVEMENTS:

Allowance for, see **EJECTMENT**.

By lessee as removing bar of statute, see **FRAUDS, STATUTE OF**, 1.

Public improvements, see **MUNICIPAL CORPORATIONS**, 7-23.

INCINERATORS:

Maintenance of as damaging private property without compensation, see **EMINENT DOMAIN**, 1, 2.

INDORSEMENT:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 4.

INFANTS:

Damages for wrongful death of, see **DEATH**.

Custody and support on divorce of parents, see **DIVORCE**.

INFORMATION:

Denial on information and belief, see **PLEADING**, 1.

INHERITANCE:

See **DESCENT AND DISTRIBUTION**.

INJUNCTION:

- Condemnation proceedings, see **EMINENT DOMAIN**, 3.
- Right of administrator to sue for injunctive relief, see **EXECUTORS AND ADMINISTRATORS**, 1.
- Enjoining interference with water right for irrigation, see **WATERS AND WATER COURSES**, 16, 17.

INSANE PERSONS:

- Personal injuries causing temporary insanity, see **DAMAGES**, 3-6.

INSANITY:

- Suspension of running of statute of limitations, see **LIMITATION OF ACTIONS**, 1, 2.
- As avoiding release of damages, see **RELEASE**, 5.

INSOLVENCY:

- See **BANKRUPTCY**.
- Of corporation, see **CORPORATIONS**, 8, 11, 12.
- Of fraudulent grantor, preferences as to creditors, see **FRAUDULENT CONVEYANCES**.

INSTRUCTIONS:

- Harmless error in giving or refusing, see **APPEAL AND ERROR**, 31-34.
- In criminal prosecutions, see **CRIMINAL LAW**, 3.
- In civil actions, see **TRIAL**, 8-10.

INSURANCE:

- Priority to funds collected on policies held as collateral, see **BANKRUPTCY**, 1-3.
- Declarations of insured as evidence, see **EVIDENCE**, 3.
- Exemption of proceeds of life insurance, see **EXEMPTIONS**, 1, 2.
- 1. **INSURANCE—FOR BENEFIT OF ANOTHER—PROCEEDS—OWNERSHIP—PAYMENT OF PREMIUM.** Where a music house carried insurance for its own benefit and upon an instrument and music belonging to another left with it for sale, and the loss was adjusted and paid for the benefit of such owner, the proceeds apportioned to her by the adjustment belong to her, and it is immaterial that she did not know of the insurance or pay any part of the premiums. *Chase & Baker Co. v. Olmsted*..... 306
- 2. **INSURANCE—MUTUAL BENEFIT CERTIFICATES—ACTIONS—PROOF OF DEATH—CONCLUSIVENESS OF STATEMENTS.** In an action upon a mutual benefit certificate, the statements in the proofs of death are not conclusive on the beneficiary, in the absence of facts creating an estoppel. *Armstrong v. Modern Woodmen of America*..... 352

INTENT:

- To deliver deeds of gift, see **DEEDS**.
- Of parties as to furnishings installed in leased building, see **FIXTURES**, 4, 5.
- Payment intended as partial satisfaction, see **RELEASE**, 4.

INTEREST:

Right to offset against claim of subcontractor for material furnished, see **CONTRACTS**, 7.

Disregarding item of, on principle of *de minimus non curat lex*, see **EQUITY**.

On taxes, see **TAXATION**, 6-8.

1. **INTEREST — ALLOWANCE — UNLIQUIDATED CLAIMS — OPEN ACCOUNT.** An unliquidated demand upon an open account for advances made in the nature of loans, draws interest where the amount can be ascertained by a mere computation; and the claim should be treated as liquidated from the time when its certainty is ascertainable. *Dornberg v. Black Carbon Coal Co.*..... 682

INTERROGATORIES:

See **DISCOVERY**.

INTERSTATE COMMERCE:

Persons engaged in, see **COMMERCE**.

Accident to employee engaged in, see **MASTER AND SERVANT**, 1.

INTOXICATING LIQUORS:

1. **INTOXICATING LIQUORS — PROHIBITION — STATUTES — CONSTRUCTION.** Rem. 1915 Code, § 6262-1, providing that the state wide prohibition law shall be liberally construed as an exercise of the police power for the protection of the economic welfare, health, peace and morals of the people precludes a strict construction thereof as a penal statute. *State v. Hemrich*..... 439
2. **SAME—PROHIBITION—STATUTES—"LIQUORS."** The term "liquor" in the prohibition law does not, *ex vi termini*, mean an alcoholic or intoxicating liquid. *State v. Hemrich*..... 439
3. **SAME — PROHIBITION — STATUTES—"ANY OTHER INTOXICATING LIQUORS"—EJUSDEM GENERIS.** Under Rem. 1915 Code, § 6262-2, defining intoxicating liquor to include whiskey, brandy, gin, rum, wine, ale, beer, and any spirituous, vinous, fermented or malt liquor, "and every other liquor or liquid containing intoxicating properties," the words "and every other," etc., do not limit the act to "intoxicating liquors," but add to the things specifically enumerated; hence the act includes "malt," liquors that are not intoxicating, and the rule of *ejusdem generis* has no application. *State v. Hemrich*..... 439
4. **SAME — PROHIBITION — STATUTES — "MALT LIQUORS."** The words "malt liquors," in Rem. 1915 Code, § 6262-2, are not used in a technical sense, but mean, as defined in the standard dictionaries, an alcoholic and fermented liquor brewed from malt and do not include a nonalcoholic or nonfermented liquor containing "malt." *State v. Hemrich*..... 439

INTOXICATING LIQUORS—CONTINUED.

5. SAME—PROHIBITION—POLICE POWER—NONINTOXICATING BEVERAGES.

In the exercise of the police power, the legislature or the people in prohibiting the sale of intoxicating liquors may prohibit the sale of nonintoxicating beverages, and may conclusively define such beverages as intoxicating liquors, within the meaning of the prohibition act, whenever that course has any reasonable relation to the accomplishment of the dominant purpose. *State v. Hemrich*..... 439

6. SAME—PROHIBITION—PROSECUTION—INTOXICATING QUALITIES—PRESUMPTION AND PROOF.

Under the state wide prohibition act, Rem. 1915 Code, § 6262-2, defining intoxicating liquors, the liquors enumerated by name are conclusively presumed to be intoxicating, and as to "any other intoxicating liquors" capable of being used as a beverage, the intoxicating quality must be proved. *State v. Hemrich*..... 439

IRRIGATION:

See WATERS AND WATER COURSES.

ISSUES:

In civil actions, see PLEADING, 3.

JITNEYS:

Regulation of, see CARRIERS, 2.

Validity of act regulating jitney busses, see CONSTITUTIONAL LAW, 1.

Liability of agent for violation of jitney bus act, see CRIMINAL LAW, 1.

Title and subject of jitney bus act, see STATUTES, 1.

JOINDER:

Of causes of action, see ACTION.

Misjoinder of causes of action, see PLEADING, 3.

JUDGES:

Nomination for office, see ELECTIONS.

1. JUDGES—VACANCY—APPOINTMENT—TERM—ELECTION. Under Const., art. 4, § 5, providing that, if a vacancy occurs in the office of a judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, the election to be at the next general election and the judge to hold office for the remainder of the unexpired term, an appointee's term ends at the election or when the judge elected to fill the vacancy has qualified. *State ex rel. Sears v. Gilliam*..... 248
2. JUDGES — ELIGIBILITY — SUSPENSION — CONSTITUTIONAL PROVISIONS. Under the rule that the reason and intention of the lawgiver controls the strict letter of the law when the latter would lead to palpable contradiction and absurdity, an attorney who is suspended from practice at the time he becomes a candidate or is required to qualify is not eligible to the office of superior court judge, under

JUDGES—CONTINUED.

Const., art. 4, § 17, which provides that no person shall be eligible to such office "unless he shall have been admitted to practice" in the courts of record; since the constitution defines a personal status which must continue and the eligibility ceases when the status ceases, and any other construction would lead to absurdity. *State ex rel. Willis v. Monfort*..... 4

JUDGMENT:

As bar to other action, see ACTION.

Review, see APPEAL AND ERROR.

Deficiency on foreclosure of mortgage, see CHATTEL MORTGAGES, 4.

Conclusiveness of judgment on contest of will, see EXECUTORS AND ADMINISTRATORS, 2.

Relief against judgment in unlawful detainer, by parties claiming under or through tenant, see LANDLORD AND TENANT.

Non obstante, see TRIAL, 7.

1. JUDGMENT—RES JUDICATA—PERSONS CONCLUDED—DISMISSAL ON DISCLAIMER—CHATTEL MORTGAGES—FORECLOSURE. A judgment foreclosing a real estate and chattel mortgage upon a theater building and upon the fixtures and personal property therein, "or hereafter placed in said building," after purchase money mortgagees, under a subsequent mortgage on chairs and fixtures that had been placed in the theater subsequent to the execution of the first mortgage, had been made parties, had disclaimed any interest in the property covered by the first mortgage, and had been dismissed from the action upon such disclaimer, is *res judicata* and a bar to a second action by them to foreclose such subsequent mortgage, the subsequent mortgagees having moved to modify the former judgment on the ground that the copy of the first mortgage served on them failed to contain the words "or hereafter placed in said building," and having failed to prosecute an appeal from the judgment or from the refusal to modify the same; since the same property was claimed by the parties to the former action and the title determined therein. *Lee v. Pasco Theatre Co.*..... 204
2. JUDGMENT—RES JUDICATA—BAR—COUNTERCLAIMS. Judgment in an action upon a lease for the recovery of the rent of a building is not *res judicata* of a counterclaim for an indebtedness due defendant upon a subsequent agreement to pay defendant for the use of the furniture, and failure to plead such counterclaim in that action does not bar a subsequent action by defendant therefor; since the facts on the matter of the counterclaim do not negative the facts sustaining the former judgment. *Munson v. Baldwin*..... 36
3. JUDGMENT—RES JUDICATA—IDENTITY OF ISSUES. A judgment setting aside a discharge of a qualified sanitary inspector under the civil service while unqualified persons were retained, is not *res judicata* preventing the city from reducing the number of employees

JUDGMENT—CONTINUED.

by ordinance, in the interest of economy, and the appointing power from making a selection from the qualified persons in service.
Kessler v. Seattle..... 192

4. JUDGMENT—BAR—RES JUDICATA—MATTERS CONCLUDED. Where plaintiff, defrauded by defendants in a deal for lands, began two actions, the first to recover damages for the fraud, and the second asking cancellation of their deed for the same fraud without asking any money judgment, judgment in the second action, which was first tried, granting cancellation, is *res judicata* only of the matters actually tried and decided, and cannot be pleaded in bar of a money judgment in the first action, the defendants having failed to move for a consolidation of the actions or to object to the splitting of plaintiff's cause of action. *Brice v. Starr*..... 501
5. SAME. In the subsequent trial of the first action, it was not error to refuse the defendants the right to relitigate the issue of fraud, which was the only issue decided by the prior judgment in the second suit. *Brice v. Starr*..... 501

JURISDICTION:

Action in different jurisdictions, as affecting plea in abatement, see ABATEMENT AND REVIVAL, 2.
 Of courts, see BANKRUPTCY, 1.

JURY:

Harmless error in estimating rate of broker's commission, see APPEAL AND ERROR, 30.
 Instructions in criminal prosecutions, see CRIMINAL LAW, 3.
 Exclusion of jury, see TRIAL, 1.
 Questions for jury in civil actions, see TRIAL, 5-7.
 Instructions in civil action, see TRIAL, 8-10.

1. JURY—RIGHT TO JURY TRIAL—EQUITABLE ACTIONS. An action to recover an interest in an estate as the widow of the deceased, in which the chief question at issue is that of marriage, is of equitable cognizance, within Rem. 1915 Code, § 315, in which there is no right to trial by jury, especially where one party demands an accounting and an injunction and the other a decree quieting title. *Watson v. Watson* 512
2. JURY—RIGHT TO JURY TRIAL—LEGAL OR EQUITABLE ACTION. An action by a trustee in bankruptcy to recover moneys deposited by the insolvent bank in another bank pursuant to a fraudulent conspiracy, is of an equitable nature, and there is no right to a jury trial, where an accounting of continuous transactions was necessary. *Dunlap v. Seattle National Bank*..... 568
3. SAME. Where two causes of action are stated, one legal and the other equitable, equity takes jurisdiction for all purposes and there is no right to trial by jury. *Dunlap v. Seattle National Bank*.. 568

KNOWLEDGE:

- Of insolvency by creditor of bankrupt, see **BANKRUPTCY**, 6, 7.
- As affecting assumption of risks by servant, see **MASTER AND SERVANT**, 6.
- As creating relation of trustee, see **TRUSTS**, 1.

LACHES:

- In repudiating contract, see **CANCELLATION OF INSTRUMENTS**.
- Of stockholders in alleging fraud in receivership and sale of assets, see **CORPORATIONS**, 8.

LAND COMMISSIONER:

- Power to lease state lands for mining purposes, see **MINES AND MINERALS**, 1-3.

LANDLORD AND TENANT:

- Parol evidence to vary written lease, see **EVIDENCE**, 8.
 - Right to fixtures as between landlord and tenant, see **FIXTURES**.
 - Improvements as removing bar of statute, see **FRAUDS, STATUTE OF**, 1.
 - Judgment in action for rent as bar to counterclaim for debt due upon subsequent agreement, see **JUDGMENT**, 2.
 - Gas and oil leases, see **MINES AND MINERALS**, 1-3.
 - Enjoining interference with water rights for irrigation, see **WATERS AND WATER COURSES**, 16, 17.
1. **LANDLORD AND TENANT — UNLAWFUL DETAINER — PARTIES — MECHANICS' LIEN CLAIMANTS.** Under Rem. 1915 Code, § 816, providing that no person other than the tenant or subtenant in actual possession need be made a party defendant in an action of unlawful detainer, and §§ 827, 830, providing for relief against the judgment by those claiming under or through the tenant, a person claiming a mechanics' lien against the interest of the tenant need not be made a party, and is nevertheless bound by the judgment as being in privity with the tenant. *Canyon Lumber Co. v. Sexton*..... 620
 2. **SAME—STATUTES—VALIDITY.** Such statute, compelling the lien claimants claiming through the tenant to seek relief under the statute, is valid. *Canyon Lumber Co. v. Sexton*..... 620
 3. **SAME—UNLAWFUL DETAINER—JUDGMENT—RELIEF FROM — LIMITATIONS—STATUTES.** Such act, in providing that the right to relief against the judgment of unlawful detainer "may" be exercised within a limited time, is not merely permissive, but precludes the idea that it can be exercised at some later time. *Canyon Lumber Co. v. Sexton* 620

LANDS:

- State lands, lease for mining purposes, see **MINES AND MINERALS**, 1-3.
- Assessment of for public improvement, see **MUNICIPAL CORPORATIONS**, 21-23.

LEASES:

See **LANDLORD AND TENANT**.

Furnishings installed in leased building, see **FIXTURES**.

Mining leases by state, see **MINES AND MINERALS**, 1-3.

LETTERS:

As evidence in civil action, see **EVIDENCE**, 1, 2.

LIBEL AND SLANDER:

1. **LIBEL AND SLANDER—WORDS LIBELOUS PER SE—INJURY TO BUSINESS—STATUTES.** Billboard posters, printed in red ink, stating that theaters employing incompetent help are dangerous, those employing competent help display a union card, and that plaintiff's theater cannot display such card, are libelous *per se*, within the definition of libel in Rem. 1915 Code, § 2424, relating to publications that injure a person in his business or occupation. *Cyclo homo Amusement Co. v. Hayward-Larkin Co.*..... 367
2. **SAME—LIBEL PER SE—DAMAGES—LOSS OF PATRONAGE—EVIDENCE.** Where a publication is libelous *per se* as injuring one's business, a recovery of substantial damages is sustained by proof of loss of patronage without other evidence of the amount of damages. *Cyclo homo Amusement Co. v. Hayward-Larkin Co.*..... 367

LICENSEE:

Injury to, see **NEGLIGENCE**.

LICENSES:

To practice medicine, see **PHYSICIANS AND SURGEONS**.

LIENS:

See **MECHANICS' LIENS**.

Of attorney, see **ATTORNEY AND CLIENT**, 1.

Mortgage, see **CHATTEL MORTGAGES**.

Mortgage lien for sums due under contract for water, see **WATERS AND WATER COURSES**, 14.

LIFE INSURANCE:

See **INSURANCE**, 2.

LIMITATION OF ACTIONS:

Relief against judgment of unlawful detainer, see **LANDLORD AND TENANT**, 3.

Time for filing application for writ of mandate, see **MANDAMUS**, 2.

Quieting title to land sold for taxes, see **TAXATION**, 9.

1. **LIMITATION OF ACTIONS — RUNNING OF STATUTE — INSANITY OF PLAINTIFF—BURDEN OF PROOF.** In an action for personal injuries, in order to toll the statute of limitations by reason of insanity, the burden of proof is upon the plaintiff to show by clear and convincing

LIMITATION OF ACTIONS—CONTINUED.

evidence that on the day he received his injuries, he became and was insane and incapable of transacting ordinary business and that the condition continued for the period necessary to toll the statute.

Roberts v. Pacific Telephone & Telegraph Co...... 274

2. **LIMITATION OF ACTIONS—RUNNING OF STATUTES—INSANITY OF PLAINTIFF—BURDEN OF PROOF—INSTRUCTIONS.** In an action for personal injuries, in which the plaintiff sought to toll the statute of limitations by reason of insanity caused by the injuries, the jury are properly instructed that, if the plaintiff has established insanity of a fixed and settled nature at a certain time by a preponderance of clear and convincing evidence, the condition is presumed to continue, and the burden would be upon the defendant to establish his subsequent sanity, so that he was able to know and comprehend the nature of his acts and able to transact and understand ordinary business. *Roberts v. Pacific Telephone & Telegraph Co.*..... 274

3. **LIMITATION OF ACTIONS—FRAUD—TIME OF DISCOVERY.** An action for fraudulently representing that a well on premises leased to plaintiffs contained an abundant supply of pure water, is barred by the statute of limitations if not commenced within three years after taking possession when plaintiffs must have discovered the fraud. *Grubb v. House*..... 200

4. **LIMITATION OF ACTIONS—FORM OF ACTION—RELIEF ON GROUND OF FRAUD—TRESPASS—ACCRUAL.** An action to recover damages for wrongful entry upon a mining claim and the removal of ore from plaintiff's lands through defendants' underground workings, which was not discoverable at the time, is not an action for relief upon the ground of fraud, under Rem. Code, § 159, providing that such an action shall not be deemed to have accrued until three years after the discovery of the fraud, but an action of trespass that is barred by Id., § 155, after three years. *Golden Eagle Mining Co. v. Imperator-Quilp Co.*..... 692

LIQUORS:

See INTOXICATING LIQUORS.

LIQUOR SELLING:

See INTOXICATING LIQUORS.

LIS PENDENS:

Pendency of other action ground for abatement, see ABATEMENT AND REVIVAL.

LOCATION:

Of boundary line, see BOUNDARIES.

LOGS AND LOGGING:

1. **LOGS AND LOGGING—SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES—MITIGATION.** Upon a breach of a contract to buy logs and

LOGS AND LOGGING—CONTINUED.

a refusal to accept delivery, the seller's measure of damages is the difference between the contract price and the market value at the time and place agreed upon for delivery; hence it is admissible to show that the seller resold the balance of the logs upon more advantageous terms and so suffered no damages, the court taking into consideration such elements as the delay and expense incurred in the resale. *Hughes v. Eastern R. & Lumber Co.*..... 558

2. **SAME—CONTRACT — BREACH OF CONTRACT — PROSPECTIVE PROFITS—MARKET—EVIDENCE.** The rule allowing the seller his prospective profits in such a case applies only where there is no market, or the commodity is manufactured to meet a purpose leading away from, rather than into, a market; and a resale is competent evidence to prove a market. *Hughes v. Eastern R. & Lumber Co.*..... 558

MACHINERY:

Liability of employer for defects, or failure to guard, see **MASTER AND SERVANT**, 3-5, 7.

MALPRACTICE:

Release of damages by servant as discharging physician furnished by master, see **RELEASE**, 2.

MALT LIQUORS:

See **INTOXICATING LIQUORS**, 3, 4.

MANDAMUS:

To compel secretary of state to certify name of candidate as nominee for office, see **ELECTIONS**, 2.

To review action of fireman's pension board, see **MUNICIPAL CORPORATIONS**, 4.

To compel payment of warrants, see **MUNICIPAL CORPORATIONS**, 31.

1. **MANDAMUS—WARRANTS—PAYMENT.** Mandamus is the proper remedy to compel a city to pay warrants where there are funds available for their payment and payment is refused. *State ex rel. Titlow v. Centralia* 401
2. **MANDAMUS—LIMITATIONS—MERITS.** Where a mandamus is filed too late, the merits will not be examined to settle disputed questions of law. *State ex rel. Mills v. Howell*..... 257

MARRIAGE:

Proof of, sufficiency, see **ADULTERY**.

1. **MARRIAGE—FINDINGS—REVIEW — CONCLUSIONS OF LAW.** Findings to the effect that a white man lived and cohabited with an Indian woman for years, without there having been any ceremonial marriage between them, that he was known as a "squaw man," that

MARRIAGE—CONTINUED.

they kept their property and its increase separate, supports the conclusions of law that they were not married and that the woman had no community interest in the man's property. *Watson v. Watson*. 512

MARRIED WOMEN:

See HUSBAND AND WIFE; MARRIAGE.

MASTER AND SERVANT:

Employees in interstate commerce, see COMMERCE.

Election of remedy by injured employee, see ELECTION OF REMEDIES.

Employees of municipal corporations, see MUNICIPAL CORPORATIONS, 2-6.

Release of damages by employee, see RELEASE, 2-5.

Construction of employment agency law, see STATUTES, 2, 3.

1. **MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—FEDERAL LIABILITY ACT—SAFETY APPLIANCE ACT.** Where an accident in interstate commerce occurred through the master's negligence, the Federal employers' liability act defines the rights of the employee and the rights of the parties depend upon it and not upon the safety appliance act. *Aldread v. Northern Pac. R. Co.*..... 209
2. **MASTER AND SERVANT—INJURY TO SERVANT—WHAT LAW GOVERNS.** Where an accident occurred in Idaho, the rule of the supreme court of that state that the failure of a hook tender in charge of a logging crew to give warning of the "go ahead" signal, was the act of a fellow servant and not a vice principal, for which the master would not be liable if he had employed competent fellow servants, is binding upon the courts of this state, when pleaded. *Bogitch v. Potlatch Lumber Co.*..... 385
3. **MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE—SAFE PLACE AND METHODS—ELEVATORS—QUESTION FOR JURY.** The negligence of the owner of a restaurant in failing to furnish safe appliances and adopt a system of rules in the use by waiters of an automatic freight and passenger elevator is a question for the jury, where the elevator was used every day by approximately 100 employees, there was no way for an employee on one floor to tell when another above or below was about to make simultaneous use of it, and a system of bells to give warning could have been installed at a cost of five dollars. *Hull v. Davenport*..... 16
4. **SAME.** That there was no evidence of a general custom of employers to adopt a system of rules for warning or signal devices is a mere matter of defense to be submitted to the jury, and does not establish insufficiency of the evidence to show negligence as a matter of law. *Hull v. Davenport*..... 16
5. **SAME—INJURY TO SERVANT—SAFE PLACE AND METHODS—ASSUMPTION OF RISKS—QUESTION FOR JURY.** Where waiters were required to

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use an automatic elevator having no system of signal devices or rules to give warning of simultaneous use by other employees, the employee does not assume the risks unless the danger was so obvious that no man of ordinary prudence would have obeyed the order; and the question is for the jury, where there was posted at the elevator entrance a standing order to "Use the Elevator," no means were provided for giving any sort of a signal, and the plaintiff testified that he did not appreciate or think of the danger because of absorption in his work. *Hull v. Davenport*..... 16

6. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE—FAILURE TO WARN—EXPLOSIVES—EVIDENCE—SUFFICIENCY. Where a workman, twenty-one years old, was injured by the explosion of a dynamite cap which he had placed in his pocket by direction of the foreman and had forgotten to remove, the supreme court will not disturb a finding that the foreman was not guilty of negligence in failing to instruct him as to the danger of handling dynamite caps and in failing to see that unused caps were returned to their place, in view of the workman's age, education, apparent intelligence and experience, as the trial court had opportunity to judge. *Jim v. Chicago, Milwaukee & St. Paul R. Co.*..... 179
7. SAME—INJURY TO SERVANT—FELLOW SERVANTS. The negligence of a fellow servant is not involved where, through the failure of the master to provide a safe place and safe appliances for the simultaneous use of an automatic elevator requiring a system of signals, a waiter was injured in entering the elevator when another employee started it without warning. *Hull v. Davenport*..... 16
8. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. A waiter entering an automatic elevator is not guilty of contributory negligence as a matter of law where he used it for the purpose intended in the only manner it could be used, and before doing so looked up and could see nothing to indicate that any one was in the act of starting it. *Hull v. Davenport*..... 16
9. SAME—INJURY TO SERVANT—ACTIONS—ISSUES AND PROOF—NEGLIGENCE. Upon an issue as to whether cars were in a train movement without having the air coupled as required by the safety appliance act, the absence of markers required on the rear of trains does not tend to show that it was a train movement. *Aldread v. Northern Pac. R. Co.*..... 209
10. SAME. Upon an allegation of negligence in releasing the air brakes on a switch engine after it had come to a stop, whereupon the momentum of the cars shoved the engine onto the plaintiff, it is inadmissible to prove a rule requiring all trains to carry markers or green flags and that flags were not displayed, since that was an independent act of negligence which in no way contributed to the injury. *Aldread v. Northern Pac. R. Co.*..... 209

11. SAME. Upon an issue as to whether cars were in a train movement without having the air coupled as required in the safety appliance act, it is inadmissible to prove that the company issued a train bulletin for another division after the accident requiring cars moved between certain points in such other division to be coupled with air. *Aldread v. Northern Pac. R. Co.*..... 209
12. SAME. Upon such issue it is inadmissible to prove a rule requiring "train pipes to be connected," the fact being admitted that the pipes were not connected. *Aldread v. Northern Pac. R. Co.*... 209
13. SAME—ISSUES AND PROOF—OPINIONS—REBUTTAL. Upon an allegation of negligence in releasing the air brakes on a switch engine after it had come to a stop, whereupon the momentum of the cars shoved the engine onto the plaintiff, it is reversible error to allow the plaintiff in rebuttal to testify that something else might have intervened, as a leaky valve or the application of steam, to start up the engine after release of the air; since it was not within the issues, and was speculative and merely the opinion of a nonexpert; and furthermore not proper rebuttal. *Aldread v. Northern Pac. R. Co.* 209

MEASURE OF DAMAGES:

See DAMAGES, 1, 2.

For wrongful death of child, see DEATH.

For fraud, see FRAUD.

For breach of contract to buy logs, see LOGS AND LOGGING, 1.

MECHANICS' LIENS:

Lien claimants as parties defendant in action of unlawful detainer, see LANDLORD AND TENANT, 1.

1. MECHANICS' LIENS—FORECLOSURE—AMENDMENT OF LIEN. In an action to foreclose a mechanics' lien, an amendment of the lien so as to charge only a leasehold interest will not avail the plaintiff where it appears that the leasehold has been forfeited under a judgment in unlawful detainer. *Canyon Lumber Co. v. Sexton*.. 620
2. MECHANICS' LIENS—FORECLOSURE—PLEADING—VARIANCE—AMENDMENT. Where a claim of mechanics' lien sought to charge the fee of the property, and the complaint was based on the theory that it was a charge upon a leasehold interest, there was such a fatal variance as to require an amendment of the lien or of the complaint. *Canyon Lumber Co. v. Sexton*..... 620

MINES AND MINERALS:

Parol evidence to vary mining contract, see EVIDENCE, 6.

Accrual of action for damages for wrongful entry and removal of ore through underground workings, see LIMITATION OF ACTIONS, 4.

Taxation of mining lands, see TAXATION, 6-8.

MINES AND MINERALS—CONTINUED.

1. **MINES AND MINERALS—LEASE—RIGHT TO LEASE—COMMISSIONER OF PUBLIC LANDS—POWERS.** Rem. 1915 Code, § 6791, providing for the leasing of state lands for the purpose of mining and extraction of petroleum and gas, leaves no discretion in the commissioner of public lands where a qualified person has complied with the provisions of the statute. *State ex rel. Hall v. Savidge*..... 676
2. **SAME—LEASE—POWERS OF COMMISSIONER—"LANDS BELONGING TO STATE."** Rem. 1915 Code, § 6791, providing for the leasing of "any land belonging to the state" for the purpose of mining and extraction of petroleum and gas, applies to lands which have been sold by the state, under Id., § 6675, reserving to the state all oils, gases, and minerals and the right to enter for the purpose of taking the same. *State ex rel. Hall v. Savidge*..... 676
3. **SAME—LEASE—RIGHT TO LEASE—CONDITIONS PRECEDENT.** Under Rem. 1915 Code, § 6675, reserving to the state, its successors and assigns, all oils, gases and minerals on lands sold by the state, with the right to enter for the purpose of taking the same, with the proviso that the state's reserved rights shall not be exercised until provision has been made by the state, its successors or assigns, to pay to the owner of the land full damages sustained by reason of the entry, an applicant of an oil lease of state lands must show that provision has been made to pay to a contracting purchaser from the state the damages that he will sustain by reason of the entry, as such person is the "owner" within the meaning of the act. *State ex rel. Hall v. Savidge*..... 676
4. **MINES AND MINERALS—SALE—CONTRACTS—CONSTRUCTION—"INCLUDING."** In a contract for the sale of a mine under which the net profits were to be determined by deducting the actual expenses of the labor, "including" the wages of men, compensation for teams, cost of board, lodging, fuel and 25 cents per miner's inch for water, the word "including" introduces an enlarging definition of the preceding general words "actual cost of labor," but excludes further enlargement than that furnished by the enlarging clause; hence, does not include cost of materials or supplies such as shovels, picks and lumber. *Blanck v. Pioneer Mining Co.*..... 26
5. **SAME.** Such clause does not authorize a charge for water at more than the specified rate for water used; notwithstanding the method of mining was changed from steam and low pressure water to high pressure water, increasing the amount of water used but lessening the cost of the operation, where the method was under the absolute control of the operator of the mine making the change. *Blanck v. Pioneer Mining Co.*..... 26
6. **SAME—SALE—VALIDITY—EQUITY—SPECULATIVE CONTRACT.** The fact that a mine could not be worked at a profit without a change to the hydraulic method, greatly increasing the amount of water to be

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used and charged for at a specified rate in figuring the net profits, does not authorize a court of equity to grant relief on the theory that it would be unconscionable in an action for an accounting to enforce the contract; as the court cannot relieve from and nullify speculative contracts. *Blanck v. Pioneer Mining Co.*..... 26

MISREPRESENTATION:

See FRAUD.

MITIGATION:

Of damages on breach of contract to buy logs, see LOGS AND LOGGING, 1.

MODIFICATION:

Of decree in divorce, see DIVORCE.

MORTGAGES:

As voidable preference, see BANKRUPTCY, 6.

Recitals in mortgage as affecting negotiable character of note, see BILLS AND NOTES, 3.

Personal property, see CHATTEL MORTGAGES.

Assumption by vendee, see VENDOR AND PURCHASER.

1. **MORTGAGES — PAYMENT — AGREEMENT TO ACCEPT PROPERTY — CONTRACT BY SUBSEQUENT PURCHASERS.** An agreement with purchasers of mortgaged property who had not assumed the debt to dismiss a foreclosure suit, in consideration of an agreement to quitclaim the land if delinquent interest was not paid within a certain time, is not an agreement to accept payment in land that would discharge the note as to the makers and indorsers; and being made with a stranger to the obligation does not imply such an agreement. *Fidelity National Bank of Spokane v. Stanton Co.*..... 344
2. **SAME.** A quitclaim deed of mortgaged premises tendered to the holder of the note pursuant to an agreement with an indorser is not accepted by the holder so as to release indorsers and discharge the obligation, where the holder returned it stating it should be made in blank, the holder expecting to turn it over to the indorser under the belief that he would pay the note and accept the deed. *Fidelity National Bank of Spokane v. Stanton Co.*..... 344

MOTHERS PENSIONS:

See CONSTITUTIONAL LAW, 2, 3.

MOTIONS:

Dissolution of attachment, see ATTACHMENT, 4.

To dismiss, or direct verdict of acquittal, see CRIMINAL LAW, 2.

Dismissal or nonsuit on trial, see TRIAL, 7.

MOTOR VEHICLES:

Regulation of, see **CARRIERS**, 1, 2.

Validity of jitney bus act, see **CONSTITUTIONAL LAW**, 1.

Liability of agent for violation of jitney bus act, see **CRIMINAL LAW**, 1.

MUNICIPAL CORPORATIONS:

Maintenance of garbage incinerator as damage to property without compensation, see **EMINENT DOMAIN**, 1, 2.

Mandamus to compel payment of warrants, see **MANDAMUS**, 1.

Payment of local improvement warrants on commingling of funds of city, see **TRUSTS**, 4.

1. **MUNICIPAL CORPORATIONS — POWERS — PORT DISTRICTS — DISBURSEMENT OF FUNDS—POLITICAL USE—STATUTES.** Under the port district act (Rem. 1915 Code, § 8165-1 *et seq.*) authorizing the creation of port districts in the nature of a municipal corporation to engage in the business of building wharves, docks and harbor improvements and of operating and maintaining them, the Port of Seattle has no implied authority to spend money in a political campaign to defeat the passage of an act referred to the voters at a general election; since the district has only such power as is expressly conferred, or fairly incident to, and can be reasonably implied from, the powers granted, and such delegation of power cannot be presumed. *State ex rel. Port of Seattle v. Superior Court*. 267
2. **MUNICIPAL CORPORATIONS—EMPLOYEES—DISCHARGE — CIVIL SERVICE —CHANGE OF CHARTER.** District health and sanitary inspectors not under civil service at the time of their appointment, and continued in the performance of their original duties without further appointing, are not affected by a change in the city charter requiring vacancies to be filled and additional employees to be appointed subject to the civil service. *Kessler v. Seattle*. 192
3. **SAME—EMPLOYEES—DISCHARGE—REDUCING NUMBER—CIVIL SERVICE.** A city has power to reduce the number of city employees in the interest of economy, and the courts will not review the appointing power in making a selection among those equally efficient and retaining those longest in service. *Kessler v. Seattle*. 192
4. **MUNICIPAL CORPORATIONS — OFFICERS AND EMPLOYEES — FIREMAN'S PENSION—ADMINISTRATION—POWERS OF PENSION BOARD—MANDAMUS.** Under Rem. 1915 Code, § 8073, subd. 4, providing that the board of the fireman's relief fund shall hear and decide all applications for relief or pensions under the act and that its decisions on such applications shall be final and conclusive on the courts, mandamus does not lie to inquire into the correctness of a ruling of the board or to review its action in denying an application for permanent relief under the act. *State ex rel. Criswell v. Board of Trustees of the Firemen's Relief and Pension Fund*. 468

MUNICIPAL CORPORATIONS—CONTINUED.

5. SAME. The act for the relief and pension of firemen, Rem. 1915 Code, § 8061 *et seq.*, confers upon the pension board power to determine who are entitled to a fixed pension, as well as to determine who are entitled to temporary relief. *State ex rel. Criswell v. Board of Trustees of the Firemen's Relief and Pension Fund*..... 468
6. SAME—OFFICERS AND EMPLOYEES—FIREMEN'S PENSION—CONSTITUTIONAL LAW—VESTED RIGHTS. The act for the relief and pension of firemen is not a vested right subject to determination by the courts, since the legislature vested the pension board with full power and authority to determine any inquiry as to who are entitled to the benefit of the act, and made its conclusion final; and the legislature had the power to pass such act. *State ex rel. Criswell v. Board of Trustees of the Firemen's Relief and Pension Fund*..... 468
7. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—RESOLUTION OF INTENTION—SCOPE—SUFFICIENCY—STATUTES. A resolution of intention to improve a number of streets by grading, constructing cement sidewalks, gutters and "drainage culverts and catch basins," fairly informs the property owners, as required by Rem. 1915 Code, § 7892-10, of the "nature" of an improvement including a storm sewer six blocks long with five manholes, which was necessary for the proper drainage of the improvement, and the cost of which was less than six per cent of the cost of the entire improvement; especially where the diagram called for by the law was on file before the time for filing remonstrances had expired and indicated the exact nature of the proposed drainage system; since the law requires only that the "nature" of the improvement be set forth in general terms. *Wilce v. Cheney*..... 422
8. SAME. In such case, it is not necessary for the resolution to specifically direct the street committee to prepare the diagram so as to show the storm sewer and manholes and all the details, where the intention was that such details be shown by the diagram, and were in fact so shown. *Wilce v. Cheney*..... 422
9. SAME—PUBLIC IMPROVEMENTS—ORDINANCE—IMPLIED REPEAL—EMINENT DOMAIN—ABANDONMENT OF PROCEEDINGS. Where, after the passage of an ordinance for a street improvement and condemnation and award thereunder, the city passed a second ordinance providing for an additional widening of one of the streets and a different system of grades but condemnation proceedings thereunder were abandoned, the second ordinance does not repeal the first ordinance by implication, where there was no such intention, and the two months within which the city could abandon the first condemnation under Rem. & Bal. Code, § 7816 *et seq.*, had expired before the second ordinance was passed. *In re Western Avenue*..... 472
10. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACT—AUTHORITY—ORDINANCE. An ordinance authorizing the board of public

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works to construct a railroad in accordance with plans and specifications to be prepared by the city engineer is broad enough to include authority to repair and reconstruct portions of the roadbed that had been damaged or destroyed by a thaw. *Waldy v. Seattle*..... 407

11. SAME—PUBLIC IMPROVEMENT—CONTRACT—ASSIGNMENT—FINDINGS—SUFFICIENCY. Findings that an assignee of a city contract and the city engineer, who had control of the work, jointly hired plaintiff to perform the extra work required to complete the work, which was done at the price called for in the contract, are reasonably susceptible of the construction that plaintiff was assignee of the contract, and hence entitled to maintain an action against the city for the balance due him on the contract. *Waldy v. Seattle*..... 407
12. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTOR'S BOND—RIGHT OF ACTION—FILING CLAIM—TIME—ACCEPTANCE OF WORK—STATUTES. Where, upon the completion of a city contract, the city engineer furnished a certificate of completion, specifying the amount then due and the ten per cent reserve which would fall due thirty days later under the contract, and on the same day the city council ordered that the same be allowed and a warrant drawn for the amount then due, there was an acceptance of the completed work at that time, without regard to a later "final estimate" and order for a warrant for the final reserve payment; hence a claim upon the contractor's bond, filed more than thirty days after completion of the work, is too late, under Rem. & Bal. Code, § 1161, providing that there shall be no action on the bond unless the claim is filed within thirty days from the completion of the contract and acceptance of the work. *Denny-Renton Clay & Coal Co. v. National Surety Co.* 103
13. MUNICIPAL CORPORATIONS—PUBLIC WORKS—CONTRACTS—ASSIGNMENTS—BOND—CLAIM OF LABORERS—PRIORITY. Where a bank, prior to notice of nonpayment for labor and material, took from a contractor on public works assignments of all moneys to become due to the contractor as security for advances to the contractor, and the contract contained no provision for a reserve of any percentage as security for labor and material claims but merely permitted the city to withhold payment until satisfied that all labor and material claims had been paid and on completion of the work the city paid the balance due into court, the assignments are valid appropriations of the fund afterwards paid by the city into court, prior and superior to any rights of laborers or materialmen, and hence superior to any right of subrogation in the surety on the contractor's bond. *Northwestern National Bank of Bellingham v. Guardian Casualty and Guaranty Co.* 635
14. SAME. The fact that a bank had, pursuant to agreement, advanced money to a contractor on public works, does not prevent it from taking assignments of labor claims, or impose the duty of

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- paying. *Northwestern National Bank of Bellingham v. Guardian Casualty and Guaranty Co.*..... 635
15. SAME. An assignment of claims for labor against a contractor on public works includes not merely a right to receive the pay due, but operates as an equitable assignment of the laborer's rights against the contractor's bond. *Northwestern National Bank of Bellingham v. Guardian Casualty and Guaranty Co.*..... 635
16. SAME. A contractor having assigned to a bank the sums to grow due on a city contract as collateral for advances, before any default of the contractor, sums due the contractor are to be first applied to repay the advances; and the balance, if any, *pro tanto*, to pay labor claims assigned to and held by the bank, and the bank is entitled to judgment against the contractor's surety on its bond for the balance of the lienable labor claims. *Northwestern National Bank of Bellingham v. Guardian Casualty and Guaranty Co.*..... 635
17. SAME. In such a case, the bank holding assignments of claims by the contractors and their stenographer, which were not lienable claims, cannot assert any right therefor, against the fund due in court or against the bond, as against the surety on the bond paying labor claims. *Northwestern National Bank of Bellingham v. Guardian Casualty and Guaranty Co.*..... 635
18. SAME—PUBLIC IMPROVEMENTS—CONTRACT—PERFORMANCE—EXTRA WORK—ACCEPTANCE—PRESUMPTION. In an action to recover for extra work on a city contract, the city cannot set up that the price therefor was not first agreed upon, as required by the contract, where the findings were silent on that subject and the presumption was that the city engineer had performed his duty in that respect; especially where the work was performed for a price fixed in the contract for extra work providing no price could be agreed upon in writing, and the work was accepted by the city. *Waldy v. Seattle* 407
19. SAME—"CLAIMS FOR DAMAGES"—FILING—ACTION ON CONTRACT. Where a contract for city work was entered into and performed, and the contractor sued for the balance due thereon, the action is on contract, and not for damages arising out of the breach thereof; hence a claim for damages is not a condition precedent to action under a charter provision requiring "all claims for damages" to be filed as therein provided. *Waldy v. Seattle*..... 407
20. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—DECISION OF CITY ENGINEER—ARBITRARINESS. A provision in a city contract making the decision of the city engineer final and conclusive as to the amount of work to be paid for under the contract, is not binding where it appears that it was so manifestly erroneous as to be arbitrary and capricious, and will be disregarded by the courts. *State ex rel. Peterson v. Seattle*..... 593

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21. **SAME—PUBLIC IMPROVEMENTS—ASSESSMENT—STATE LANDS—STATUTES—“LOCAL IMPROVEMENTS.”** Rem. 1915 Code, § 6875, providing that all city lands of the state except tide lands may be assessed for the cost of local improvements specially benefiting the same, authorizes an assessment for street improvements against a state armory site situated on upland in a city; “local improvement” including improvements made upon streets and not upon the land itself. *In re Western Avenue*..... 472
22. **SAME—PUBLIC IMPROVEMENTS—ASSESSMENT—NOTICE.** Under Rem. 1915 Code, § 6877, providing that no city shall have jurisdiction to make a local improvement or levy an assessment against state lands until notice of the making of such proposed improvement and the fixing of the time for hearing and confirming the same be served upon the state land commissioner, it is sufficient that notice was given when it was determined that the state land was specially benefited and the state appeared and was heard in opposition to the assessment. *In re Western Avenue*..... 472
23. **MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—BENEFITS—REVIEW.** The action of eminent domain commissioners in assessing property for benefits from improvements more than a mile distant will not be disturbed on appeal where the evidence as to the fact of benefits was conflicting; as that was a question of fact which cannot be reversed except in case of fraud, mistake or arbitrary action amounting to an abuse of discretion. *In re Western Avenue* 472
24. **MUNICIPAL CORPORATIONS—STREETS—ESTABLISHMENT—PRESCRIPTION—ADVERSE USE—EXTENT—WIDTH OF STREETS.** Where, for a period of thirty-four years, there had been a well-defined road of from eight to fourteen feet in width in a city, used by the public “for miscellaneous purposes,” the public is not limited to such width as was actually used, but is entitled to such as is reasonably necessary for the easement of travel; hence an adjoining owner who recognized the public right to the extent of dedicating a fifteen-foot right of way, cannot thereby confine the public to that width, or claim damages for the appropriation of a strip thirty feet in width, where the same appears reasonably necessary, in view of the statute making county roads from 60 to 30 feet in width, and in view of a sixty-foot width for adjacent streets and the northern portion of the street in question. *Olympia v. Lemon*..... 508
25. **MUNICIPAL CORPORATIONS—STREETS—DEFECTIVE SIDEWALKS—NOTICE.** In an action for injuries sustained by stepping upon a loose plank in a sidewalk, evidence that notice of the defect had been given to a person in charge of a nearby municipal bath plant, under the board of park commissioners, is inadmissible to show notice to

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- the city, where the streets were in charge of the board of public works. *MacDermid v. Seattle*..... 167
26. SAME—STREETS—DEFECTIVE SIDEWALKS—ACTIONS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. In an action for personal injuries sustained by stepping upon a loose plank in a sidewalk, in which the city pleaded contributory negligence, the same becomes an issue from the evidence of the plaintiff in detailing the circumstances, and properly the subject of an instruction to the jury. *MacDermid v. Seattle* 167
27. MUNICIPAL CORPORATIONS—SIDEWALKS—TRAPDOORS—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. Negligence in the maintenance of a trapdoor in a sidewalk is a question for the jury where there was evidence to the effect that the doors sagged down under the weight of a person, so that plaintiff's toe was caught under the edge of the door and she was tripped and fell and broke her leg. *DeLor v. Symons* 231
28. MUNICIPAL CORPORATIONS—WATER WORKS—NEGLIGENCE—EVIDENCE—SUFFICIENCY. Negligence of the city is established where a break in a water main, flooding the plaintiff's premises, was due to the improper use of a cast-iron bushing instead of a metal of greater strength, which broke when, after ten years, the foundation of a heavy meter decayed and cast the weight upon the bushing, and the condition of the foundation could have been readily ascertained by an inspection which the city failed to make. *Imperial Candy Co. v. Seattle* 145
29. SAME—WATER WORKS—NEGLIGENCE—DAMAGE TO GOODS—PROXIMATE CAUSE. Damage to goods in the basement of the building is the natural and probable consequence of the breaking of a three-inch water main leading into the basement, so that negligence leading to the break was the proximate cause of the damage. *Imperial Candy Co. v. Seattle*..... 145
30. SAME—WATER WORKS—DAMAGE TO GOODS—CONTRIBUTORY NEGLIGENCE. In an action for damages to goods stored in a basement through the breaking of a water main, contributory negligence cannot be attributed to the plaintiff, a tenant, from the fact that there was no drain from the basement as required by city ordinance, which did not forbid the use of such a basement by a tenant, and where it was not claimed that the building was so constructed without obtaining a permit. *Imperial Candy Co. v. Seattle*..... 145
31. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT FUND—CITY TREASURER—LIABILITY OF SUCCESSOR. In mandamus against a city and its city treasurer to compel the payment of warrants, it is no defense that the present city treasurer is not the same person who held the office when the funds were received; as the office is continuous, regardless of the person who fills it. *State ex rel. Titlow v. Centralia* 401

MUTUAL BENEFIT INSURANCE:

See INSURANCE, 2.

NAVIGABLE WATERS:

1. **NAVIGABLE WATERS—SHORE LANDS—STATE DEED—TITLE—OUTER BOUNDARY—EXTENSION.** An authorized state deed of second-class tide lands vests in the grantees an absolute fee-simple title; and where the outer boundary is undefined except as defined by law as the line of navigability, the grantees take title to such line as it then existed or as it might be moved further out by any act of the state lowering the waters. *Puget Mill Co. v. State*..... 128
2. **SAME—STATE DEED—RESERVATIONS—VALIDITY—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT.** Such title cannot be impaired by any act of the state after making the deeds upon which the title rests; hence attempted reservations to public use designated upon the state's plats above the harbor lines established, except extensions of existing streets running transversely to the shore line, are void. *Puget Mill Co. v. State*..... 128
3. **SAME—SHORE LANDS—OUTER BOUNDARY—EXTENSIONS—STREETS—RIGHT TO EXTEND.** Where the state's grantees of shore lands became entitled, upon the lowering of the waters by an act of the state, to added shore lands to the line of navigability, the state and municipal authorities representing the public become entitled, on the same principle, to claim the added shore line which is in front of and abutting upon the end of existing streets running transversely and substantially at right angles to the shore line. *Puget Mill Co. v. State* 128
4. **SAME—SHORE LANDS—STATE DEED—OUTER BOUNDARY—ESTABLISHMENT OF HARBOR AREA.** The conveyance of second-class tide lands to private individuals before the establishment of harbor lines in front thereof, is subject to the power of the state to thereafter establish such harbor lines, leaving the outer boundary of the shore land subject to the establishment of harbor lines. *Puget Mill Co. v. State* 128
5. **SAME—SHORE LANDS—ESTABLISHMENT OF HARBOR AREA—COMMISSION—POWERS—STATUTES.** Where harbor lines in front of second-class tide lands are platted by the commissioner of public lands, pursuant to Rem. 1915 Code, § 8173-2, authorizing him to select and plat the same, and the harbor line commission joined therein by entering its formal order establishing the harbor lines designated on the plats, there was a lawful establishment thereof, notwithstanding article 15 of the constitution, in connection with Rem. 1915 Code, § 6744, seems to contemplate the establishment of harbor lines, within specified limits (not including second-class tide lands) by a "commission"; as the duty and power prescribed does not constitute a limitation of power upon the legislature touching harbor lines in front of second-class tide lands. *Puget Mill Co. v. State*..... 128

NAVIGABLE WATERS—CONTINUED.

6. SAME—SHORE LINES—HARBOR AREA—SLIPS AND WHARVES—TITLE OF STATE. Upon quieting the title of the state to designated sites for slips and wharves shown on the plat of the harbor area, the title should be quieted only in such slips and wharves and portions thereof as are within the designated harbor areas, and not above the harbor areas. *Puget Mill Co. v. State*..... 128
7. SAME—SHORE LANDS—ESTABLISHMENT OF OUTER BOUNDARY—“PIERHEAD LINES.” In platting harbor areas, the designation of a “pierhead” line alone, upon the state plat, is not the establishing of harbor lines or harbor areas and does not fix the inner harbor line which when established fixes the shore land boundary. *Puget Mill Co. v. State*..... 128
8. SAME—SHORE LANDS—ESTABLISHMENT OF OUTER BOUNDARY—POWER OF STATE. The state has power to determine, by the establishment of harbor lines, the line of navigability or outer boundary of shore lands dividing harbor area from second-class tide lands sold to private individuals. *Puget Mill Co. v. State*..... 128

NECESSITY:

- For findings for purpose of review, see APPEAL AND ERROR, 24.
 Of affidavit of good faith and recording, see CHATTEL MORTGAGES, 2, 3.
 For findings in equity case, see TRIAL, 11, 12.

NEGLIGENCE:

- Of carrier, see CARRIERS, 3, 4.
 Measure of damages, see DAMAGES, 1, 2.
 Causing death, see DEATH.
 Cause of personal injuries, see ELECTRICITY.
 Sale of unwholesome food, see FOOD.
 Of employer, see MASTER AND SERVANT.
 Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 8.
 Cause of personal injuries in city street, see MUNICIPAL CORPORATIONS, 25-27.
 Of person injured on street, see MUNICIPAL CORPORATIONS, 26.
 Of city in improper use of cast-iron bushing on water pipe, see MUNICIPAL CORPORATIONS, 28.
1. NEGLIGENCE—DANGEROUS PREMISES—LICENSEES OR INVITEES—EVIDENCE. Under the rule that an implied invitation to visit premises, as distinguished from mere license, requires mutuality of interest on the subject to which the visitor's business relates, plaintiff, injured by falling into an unguarded pit at night, is a mere licensee and not an invitee, where it appears that on request he was accompanying another to make a purchase, who, on entering the building, suggested that plaintiff wait outside because of the darkness, thereby

NEGLIGENCE—CONTINUED.

removing the status of invitee on the part of the plaintiff, who had no business of his own on the premises. *Gasch v. Rounds*..... 317

2. **SAME—CARE REQUIRED AS TO TRESPASSERS.** The owner of premises owes no duty to a mere licensee who fell into an unguarded pit at night, except not to wantonly or willfully injure him. *Gasch v. Rounds* 317
3. **SAME—CONTRIBUTORY NEGLIGENCE OF TRESPASSERS.** In such a case, the plaintiff, in disregarding the suggestion and advancing in the darkness without a light or any caution, and plunging at right angles from a straight passage, is guilty of contributory negligence as a matter of law. *Gasch v. Rounds*..... 317

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES.**

NEWLY DISCOVERED EVIDENCE:

Ground for new trial in civil actions, see **NEW TRIAL**, 2, 3.

NEW TRIAL:

Review of discretion in rulings on, see **APPEAL AND ERROR**, 20-22.

1. **NEW TRIAL—MISCONDUCT OF COUNSEL—PREJUDICE.** A new trial for misconduct of counsel in argument in making statements outside the record was properly refused, where the jury were instructed to disregard them, they were not of such a character as to prejudice the jury, and the size of the verdict did not indicate passion or prejudice. *DeLor v. Symons*..... 231
2. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE.** A new trial should not be granted for newly discovered evidence that is merely cumulative. *Shell v. Svensson*..... 40
3. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.** In an action for personal injuries in which it was shown that plaintiff required crutches for walking, a new trial for newly discovered evidence is properly refused upon a showing by affidavits and photographs that, seventeen days after the trial, the plaintiff was walking with a cane, and some of the medical witnesses were of the opinion that he had been "faking his injuries"; it appearing from the affidavit of plaintiff and his physician that he had been advised to try using a cane and could walk only short distances without crutches; since the newly discovered evidence was largely cumulative and would not likely change the result, and the amount of the verdict plainly indicating that the award was not for total or permanent disability. *Gilson v. Washington Water Power Co.* 480

NOMINATION:

For office, see **ELECTIONS.**

NONRESIDENTS:

Immunity from service of process, see **PROCESS**.

NONSUIT:

On trial, see **TRIAL**, 7.

NOTES:

Promissory notes, see **BILLS AND NOTES**.

NOTICE:

Of appeal, see **APPEAL AND ERROR**, 3, 4.

Of insolvency by creditor of bankrupt, see **BANKRUPTCY**, 6, 7.

Of fraud in procurement of note, see **BILLS AND NOTES**, 8.

To purchaser of defects in note, see **BILLS AND NOTES**, 9, 10.

Of claim to architect by contractor for damages from delay of sub-contractor, see **CONTRACTS**, 3.

Of intention to make public improvement, see **MUNICIPAL CORPORATIONS**, 7, 8.

Claim for damages, see **MUNICIPAL CORPORATIONS**, 19.

Of proposed local improvement, see **MUNICIPAL CORPORATIONS**, 22.

Defects in sidewalk, see **MUNICIPAL CORPORATIONS**, 25.

Of action, see **PROCESS**.

Of appropriation, see **WATERS AND WATER COURSES**, 5.

NUISANCE:

Negligent operation of garbage plant as creating, liability of city, see **EMINENT DOMAIN**, 2.

OBJECTIONS:

Necessity for purpose of review, see **APPEAL AND ERROR**, 1, 2.

To submission to arbitration, waiver of, see **ARBITRATION AND AWARD**, 3.

OBLIGATION OF CONTRACT:

Impairment of title to tide lands by attempted reservations to public use, see **NAVIGABLE WATERS**, 2.

OFFER:

Of proof, see **TRIAL**, 1, 2.

OFFICE:

Nomination for, see **ELECTIONS**.

OFFICERS:

Corporate officers, see **CORPORATIONS**, 5-7, 9, 10.

Municipal officers, see **MUNICIPAL CORPORATIONS**, 4-6, 31.

OILS:

See **MINES AND MINERALS**, 1-3.

OPERATING PROPERTY:

Of railroads, taxation of, see **TAXATION**, 1, 2.

OPINION EVIDENCE:

In civil actions, see **EVIDENCE**, 11, 12.

As to cause of starting engine, see **MASTER AND SERVANT**, 13.

ORAL CONTRACTS:

See **FRAUDS, STATUTE OF**.

Burden of proof to establish, see **CONTRACTS**, 1.

ORDERS:

In bankruptcy proceedings, persons concluded, see **BANKRUPTCY**, 3.

ORDINANCES:

Authorizing public improvement, see **MUNICIPAL CORPORATIONS**, 9, 10.

OSTEOPATHS:

Practicing surgery without license, see **PHYSICIANS AND SURGEONS**.

OVERHEAD CHARGES:

Right of contractor to offset in action for material furnished, see **CONTRACTS**, 4.

OWNERSHIP:

Of proceeds of insurance for benefit of another, see **INSURANCE**, 1.

PARENT AND CHILD:

Custody and support of children on divorce, see **DIVORCE**.

PAROL CONTRACTS:

See **FRAUDS, STATUTE OF**.

PAROL EVIDENCE:

In civil action, see **BANKRUPTCY**, 2.

To vary indorsement on note, see **BILLS AND NOTES**, 4.

To show failure of consideration, see **BILLS AND NOTES**, 13.

To explain contract for commissions, see **BROKERS**, 3.

In construction of contract, see **CONTRACTS**, 2.

In civil actions, see **EVIDENCE**, 6-10.

PARTIES:

See **ATTACHMENT**, 3.

Entitled to notice of appeal, see **APPEAL AND ERROR**, 3, 4.

Persons concluded by order in bankruptcy declaring dividend, see **BANKRUPTCY**, 3.

Liability for deficiency judgment on foreclosure of mortgage, see **CHATTEL MORTGAGES**, 4.

Construction of contract by, see **CONTRACTS**, 2.

PARTIES—CONTINUED.

Criminal prosecutions, see **CRIMINAL LAW**, 1.

Admission as evidence, see **EVIDENCE**, 3.

Entitled to sue to quiet title, see **EXECUTORS AND ADMINISTRATORS**, 1.

Persons entitled to exemptions, see **EXEMPTIONS**.

Persons concluded by judgment, see **JUDGMENT**, 1.

Parties defendant in action of unlawful detainer, see **LANDLORD AND TENANT**, 1.

Discharged by release of damages, see **RELEASE**, 2-4.

PARTNERSHIP:

1. **PARTNERSHIP—RELATION—EVIDENCE—QUESTION FOR JURY.** In an action against the firm of G. & G. for personal injuries, the relation of defendant J. as a partner is a question for the jury, although defendants denied that he was a member of the firm, where there was evidence that he hired the plaintiff, looked after part of the work, at one time paid the plaintiff for work and stated that he was interested in the firm, and when, in the course of a year, the firm organized as a corporation, he became the president of the corporation. *Randall v. Gerrick*..... 522

PASSENGERS:

Carriage of, see **CARRIERS**.

PATENTS:

1. **PATENTS—SALE OF INVENTION—FAILURE OF CONSIDERATION.** Notes given for a valueless unpatentable device, upon representations that it was valuable and patentable, are without consideration. *Cradick v. Emery*..... 648
2. **SAME—SALE—CONSIDERATION—ESTOPPEL.** A purchaser of a mechanical device who was not a mechanic is not estopped to assert want of consideration by the fact that he made his own investigations and inquiries before purchasing, where it appears that he relied upon the seller's statements that it was valuable and patentable rather than upon opinions of those of mechanical knowledge who examined it casually and believed it impracticable. *Craddick v. Emery* 648

PAYMENT:

See **MORTGAGES**.

Of taxes to sustain adverse possession, see **ADVERSE POSSESSION**.

Bill of exchange or promissory note, see **BILLS AND NOTES**, 4-6.

For corporate stock, see **CORPORATIONS**, 1.

Of insurance premium, see **INSURANCE**, 1.

Mandamus to compel payment of city warrants, see **MANDAMUS**, 1;

MUNICIPAL CORPORATIONS, 31.

As partial satisfaction, see **RELEASE**, 4.

PAYMENT—CONTINUED.

Retaking possession on default in payments under conditional sales contract, see **SALES**, 5.

Tender of, see **TENDER**.

Of city warrants from commingled trust funds, see **TRUSTS**, 4.

Price of land sold, see **VENDOR AND PURCHASER**.

1. **PAYMENT—APPLICATION—COLLATERAL—RIGHTS OF HOLDER.** Where insurance policies were held by a bank as collateral to secure the whole indebtedness of the insured, which included a \$5,000 note, a forced payment on the policies of \$6,000 without direction as to its application, may be applied by the bank to any part of the indebtedness, and therefore does not operate as full payment of the note when not so applied. *American Savings Bank & Trust Co. v. Munson* 78

PENALTIES:

For refusal to answer interrogatories, see **DISCOVERY**.

For failure to pay taxes, see **TAXATION**, 6, 7.

PENSIONS:

For indigent mothers, see **CONSTITUTIONAL LAW**, 2, 3.

For firemen, see **MUNICIPAL CORPORATIONS**, 4-6.

PERFORMANCE:

Of contract, see **CONTRACTS**, 4-7.

As removing bar of statute, see **FRAUDS, STATUTE OF**, 2.

Of contract for public work, see **MUNICIPAL CORPORATIONS**, 18, 19.

PERMITS:

For operation of jitney bus, see **CARRIERS**, 1, 2.

PERSONAL INJURIES:

See **NEGLIGENCE**.

To passenger, see **CARRIERS**, 3, 4.

Damages for, see **DAMAGES**.

Election of remedy for by injured employee, see **ELECTION OF REMEDIES**.

From electric shock, see **ELECTRICITY**.

Insanity of plaintiff as tolling statute of limitations, see **LIMITATION OF ACTIONS**, 1, 2.

To employee, see **MASTER AND SERVANT**.

To person on city street, see **MUNICIPAL CORPORATIONS**, 25-27.

Newly discovered evidence ground for new trial, see **NEW TRIAL**, 3.

Release of damages for, see **RELEASE**.

PHYSICIANS AND SURGEONS:

As experts, see **EVIDENCE**, 11.

Release of damages by servant as discharging physician furnished by master, see **RELEASE**, 2.

PHYSICIANS AND SURGEONS—CONTINUED.

1. **PHYSICIANS AND SURGEONS—REGULATION—LICENSE TO PRACTICE—STATUTES—CONSTITUTIONALITY.** Rem. 1915 Code, § 8392, requiring applicants for licenses to practice medicine and surgery to present a diploma the requirements of which shall have been "in no particular less than those prescribed by the Association of American Medical Colleges for that year," is not unconstitutional as granting legislative functions to such association. *State v. Bonham*.... 489
2. **SAME.** Such provision could not be objected to by one applying for a license to practice osteopathy, as he was not affected by it, and it will not render the whole act unconstitutional. *State v. Bonham* 489
3. **SAME—REGULATION—LICENSE TO PRACTICE—METHODS EMPLOYED—OSTEOPATHS—STATUTES.** The medical act having made a distinction between the practicing of medicine and osteopathy, confining the practitioners of each to the system they profess to practice; and the practice of osteopathy, at the time of the passage of the act, being confined to treatment without drugs or surgery; one licensed only to practice osteopathy is guilty of a misdemeanor in treating a patient by cutting out the tonsils and administering medicine, to wit, stypticene, under Rem. 1915 Code, §§ 8386-8407, section 8406 making it incumbent upon the holder of a certificate, under penalty of a misdemeanor, to use no deception in the use of titles of his or her mode of treating the sick and to use only such title as he or she holds license to practice. *State v. Bonham*..... 489

PIERHEAD LINES:

See NAVIGABLE WATERS, 7.

PLATS:

Of harbor area, see NAVIGABLE WATERS, 6, 7.

PLEADING:

Amendment on appeal, see APPEAL AND ERROR, 17, 18.

Harmless error in rulings on, see APPEAL AND ERROR, 27, 28.

In action for breach of implied warranty of wholesomeness of food sold, see FOOD.

Laws of other state, see MASTER AND SERVANT, 1.

Enforcement of mechanics' lien, see MECHANICS' LIENS, 2.

1. **PLEADING—DENIALS—MATTERS OF RECORD.** A denial on information and belief of matters that are of public record is bad. *Canyon Lumber Co. v. Sexton*..... 620
2. **PLEADING—AMENDMENT—AT TRIAL—ABUSE OF DISCRETION.** In an action by a trustee of a corporation to recover a balance of a collection wrongfully divided among the stockholders, in which one of the defendants claimed an attorney's fee for making the collection, it is an abuse of discretion to refuse leave to make a trial amendment to

PLEADING—CONTINUED.

his answer setting up the reasonable value of the services, where plaintiff knew from the beginning that he claimed such a fee in addition to his retainer, in view of the liberal rule imposed by Rem. 1915 Code, § 303, as to amendments. *Jensen v. Kohler*..... 8

3. PLEADING—ISSUES—STRIKING CAUSE OF ACTION—EFFECT. Where one of two causes of action was struck out in response to defendants' demurrer for misjoinder, the defendants cannot insist upon litigating the eliminated issue under an affirmative defense where the plaintiff did not seek to try, and the complaint as corrected did not tender, the issue. *Jensen v. Kohler*..... 8

POLICE POWER:

See CONSTITUTIONAL LAW, 4; INTOXICATING LIQUORS, 1, 5.

PORT DISTRICTS:

Disbursement of funds for political use, see MUNICIPAL CORPORATIONS, 1.

POSSESSION:

Character of to establish title, see ADVERSE POSSESSION.

Of mortgaged property, see CHATTEL MORTGAGES, 3.

Change of as against creditors of vendor, see FRAUDULENT CONVEYANCES, 1.

Retaking possession by seller under conditional sales contract, see SALES, 5.

POSTERS:

Billboard posters as libel *per se*, see LIBEL AND SLANDER.

POWERS:

Of land commissioner to lease state lands for mining purposes, see MINES AND MINERALS, 1-3.

Of port districts, see MUNICIPAL CORPORATIONS, 1.

Of fireman's pension board, see MUNICIPAL CORPORATIONS, 4-6.

Of harbor line commission, see NAVIGABLE WATERS, 5.

Of state to establish outer shore land boundaries, see NAVIGABLE WATERS, 8.

Of railroad commission to classify operating property of railroad, see TAXATION, 2.

Of state to authorize appropriation of waters, see WATERS AND WATER COURSES, 1.

PRACTICE:

See APPEAL AND ERROR; ATTACHMENT; EVIDENCE; JURY; NEW TRIAL; PLEADING; TRIAL.

Prosecution of actions in general, see ACTION.

In equity, see EQUITY.

Of medicine without certificate, see PHYSICIANS AND SURGEONS.

PREFERENCES:

Effect of proceedings in bankruptcy, see **BANKRUPTCY**, 4-7.

Of creditors by failing debtor, see **FRAUDULENT CONVEYANCES**.

PREJUDICE:

Ground for reversal in civil actions, see **APPEAL AND ERROR**, 27-34.

Ground for estoppel, see **ESTOPPEL**.

As ground for new trial, see **NEW TRIAL**, 1.

PREMISES:

Dangerous premises, see **NEGLECT**.

PREMIUMS:

For insurance, see **INSURANCE**, 1.

PRESCRIPTION:

Establishment of city street, see **MUNICIPAL CORPORATIONS**, 24.

Right to use of waters, see **WATERS AND WATER COURSES**, 9-12.

PRESUMPTIONS:

On appeal, see **APPEAL AND ERROR**, 19.

As to holding over term by trustees, see **CORPORATIONS**, 5.

As to liability of trustees for debts of corporation, see **CORPORATIONS**, 7.

As to character of furnishings annexed to freehold, see **FIXTURES** 5, 6.

As to community character of property, see **HUSBAND AND WIFE**, 7

As to intoxicating quality of liquors enumerated in state wide prohibition law, see **INTOXICATING LIQUORS**, 6.

As to performance of duties by city engineer, see **MUNICIPAL CORPORATIONS**, 18.

As to holding of waters under claim of right, see **WATERS AND WATER COURSES**, 11.

PRIMARY ELECTIONS:

See **ELECTIONS**.

PRINCIPAL AND AGENT:

See **BROKERS**; **FACTORS**.

Liability of agent for violation of jitney bus act, see **CRIMINAL LAW** 1.

1. **PRINCIPAL AND AGENT—RELATION—BANK AS COLLECTING AGENT—EVIDENCE—SUFFICIENCY.** A bank collecting and holding on deposit for a logger the proceeds of the sales of certain rafts of logs, is not shown to be an agent to collect or disburse all or any part of the proceeds for the benefit of the owner, under a stumpage contract whereby the logger agreed to pay \$2.85 per thousand for logs cut as soon as they were sold; where it appears that the logger made pay

PRINCIPAL AND AGENT—CONTINUED.

ment, either through the bank or directly, for the first rafts sold, that the bank was helping to finance the logging operations, advancing money to the logger, who at times overdrew the account, and that the bank, in making collections from the purchasing mills, was acting under the directions of the logger and making only such disbursements as directed by him; it further appearing that the logging operations took up the whole of the proceeds, leaving insufficient to pay the stumpage under the contract. *Vance Lumber Co. v. United States Trust Co.*..... 563

PRINCIPAL AND SURETY:

Service of notice of appeal on surety on cost bond, see **APPEAL AND ERROR**, 3, 4.

Surety on contractor's bond, see **MUNICIPAL CORPORATIONS**, 12-17.

PRIORITIES:

Of claims of creditors, see **BANKRUPTCY**, 1-3, 8.

Of mortgages, see **CHATTEL MORTGAGES**, 2.

Of claims against contractor on public work, see **MUNICIPAL CORPORATIONS**, 13.

PRIVILEGE:

Of nonresident from service of process, see **PROCESS**.

PROCESS:

On appeal, see **APPEAL AND ERROR**, 3, 4.

1. **PROCESS—PRIVILEGE—NONRESIDENTS—ATTENDANCE AT COURT—REASONABLE TIME.** Immunity of a nonresident from the service of summons, claimed by him on the ground that he was temporarily in this state for the purpose of attending upon, and redeeming property from, an execution sale, is not established where it appears that no redemption was made while he was in the state, and that he spent twenty-four days in the state arranging a trade of his property and remained in the state at least twenty-four hours after his business was concluded before starting to return; since more than a reasonable time elapsed without offering excusatory facts or circumstances. *Groundwater v. Town*..... 384

PROFITS:

Damages for prospective profits on breach of contract to buy logs, see **LOGS AND LOGGING**, 2.

PROHIBITION:

State-wide prohibition, see **INTOXICATING LIQUORS**.

PROMISSORY NOTES:

See **BILLS AND NOTES**.

PROOF:

- Of death, see **INSURANCE**, 2.
- Offer of proof, see **TRIAL**, 1, 2.

PROPERTY:

- See **FIXTURES**.
- Adverse possession, see **ADVERSE POSSESSION**.
- Subject to mortgage, see **CHATTEL MORTGAGES**, 1.
- Taking or damaging for public use, see **EMINENT DOMAIN**.
- Exempt from execution, see **EXEMPTIONS**.
- Separate or community nature of, see **HUSBAND AND WIFE**.
- Agreement to accept property in payment of mortgage debt, see **MORTGAGES**.
- Assessment of for improvement, see **MUNICIPAL CORPORATIONS**, 21-23.
- Taxation of, see **TAXATION**.

PROVINCE OF COURT AND JURY:

- In civil actions, see **TRIAL**, 5, 6.

PROXIMATE CAUSE:

- Of injury from electric shock, see **ELECTRICITY**, 2.
- Of damage to goods in basement by break in water main, see **MUNICIPAL CORPORATIONS**, 29.

PUBLICATION:

- Of libel, see **LIBEL AND SLANDER**.

PUBLIC IMPROVEMENTS:

- By municipalities, see **MUNICIPAL CORPORATIONS**, 7-23.

PUBLIC LANDS:

- Allowance for betterments placed on, see **EJECTMENT**.
- Mineral lands, right to lease, see **MINES AND MINERALS**, 1-3.
- Appropriation of waters for irrigation, see **WATERS AND WATER COURSES**, 1-13.

PUBLIC SERVICE COMMISSION:

- Classification of railroad property for taxation, see **TAXATION**, 2.

PUBLIC USE:

- Taking property for public use, see **EMINENT DOMAIN**.

QUESTION FOR JURY:

- Procuring cause of exchange of property, see **BROKERS**, 4.
- In action for injuries from electric shock, see **ELECTRICITY**, 2, 3.
- Liability of retailer on sale of unwholesome meat, see **FOOD**, 3.
- Negligence in failing to furnish safe appliances and adopt system of signals for operation of elevator, see **MASTER AND SERVANT**, 3.
- Assumption of risk by servant, see **MASTER AND SERVANT**, 5.

QUESTION FOR JURY—CONTINUED.

Contributory negligence of servant in using automatic elevator,
see MASTER AND SERVANT, 8.

Negligence in maintenance of trapdoor in sidewalk, see MUNICIPAL
CORPORATIONS, 27.

Partnership relation, see PARTNERSHIP.

In civil actions, see TRIAL, 5-7.

QUIETING TITLE:

Right of administrator to sue, see EXECUTORS AND ADMINISTRATORS, 1.
Title of state to designated sites for slips and wharves on plat of
harbor area, see NAVIGABLE WATERS, 6.

To land sold for taxes, limitations, see TAXATION, 9.

RAILROADS:

Employees engaged in interstate commerce, see COMMERCE.

Appropriation of property, see EMINENT DOMAIN, 3.

As employers, see MASTER AND SERVANT, 1, 6, 9-13.

Taxation, see TAXATION, 1, 2.

RATES:

Of broker's commission on exchange of property, see CUSTOMS AND
USAGES.

REAL ESTATE:

Assessment for taxation, see TAXATION, 1-5.

REAL ESTATE AGENTS:

See BROKERS.

REBUTTAL:

Evidence in rebuttal, see MASTER AND SERVANT, 13.

RECEIVERS:

Of corporations in general, see CORPORATIONS, 8.

RECORDS:

On appeal, see APPEAL AND ERROR, 5-11.

Of chattel mortgages, see CHATTEL MORTGAGES, 2, 3.

As evidence, see EVIDENCE, 4, 5.

Matters of record, denial on information and belief, see PLEADING, 1.

Of conditional sales contract, see SALES, 1, 2.

REDUCTION:

Of excessive tax, see TAXATION, 6-8.

REGULATION:

Of jitney busses, see CARRIERS, 1, 2; CONSTITUTIONAL LAW, 1.

Of business as exercise of police power, see CONSTITUTIONAL LAW, 4.

Licensing of physicians, see PHYSICIANS AND SURGEONS.

RELEASE:

Of property on filing claim for exemptions, see **EXEMPTIONS**, 4.
 Of mortgage debt, see **MORTGAGES**.

1. **RELEASE—VALIDITY—FRAUD — EVIDENCE — SUFFICIENCY.** To overcome a release of damages, fraud, false representations or overreaching must be established by clear and convincing testimony; and the evidence is insufficient, where it appears that an intelligent miner, who had had some schooling, and knew the company owed him nothing, signed a release which was read over to him, and accepted money which he knew the company would be paying only in settlement of any claim he might have for damages, and his claim that he could not understand the meaning of such words as "injury," "liability" and "settlement" and that he thought he was receiving "wages" is not substantiated by the record. *Reynolds v. Day*.. 395
2. **RELEASE AND DISCHARGE—DAMAGES INCLUDED—INJURIES TO SERVANT—MALPRACTICE OF PHYSICIAN.** Malpractice by an attending physician, in a case in which the master was liable for the original injury, being one of the probable consequences of the injury for which the master is liable whether furnishing the physician or not, a release of all damages, given to the master in full settlement of any and all claims of every kind, operates to discharge a physician furnished by the master, and precludes an action against the physician for malpractice in treating the injury and carelessly aggravating the damages. *Martin v. Cunningham*..... 517
3. **RELEASE AND DISCHARGE—PARTIAL RELEASE—DISCHARGE OF PARTY NOT LIABLE—EFFECT.** While a satisfaction of a wrong by one not in fact liable operates as a release of the actual wrongdoer, a party may, for a consideration, release one not liable without releasing the wrongdoer if the consideration was not in fact accepted as a satisfaction for the injury; there being a distinction between a release and a satisfaction. *Randall v. Gerrick*..... 522
4. **SAME—PARTIAL SATISFACTION—INTENTION.** Where an action for personal injuries was brought by an employee against a railroad company and an independent contractor for whom plaintiff was working, and upon voluntarily paying a small sum to avoid costs, the railroad company was dismissed because it was found that it was not liable as a joint tortfeasor, the payment from the company does not release the independent contractor, as it was not intended as even a partial satisfaction of the damages. *Randall v. Gerrick* 522
5. **RELEASE—AVOIDANCE—INSANITY — INSTRUCTIONS.** Upon an issue as to plaintiff's insanity at the time of signing a release of damages, an instruction that his mental incapacity must be established by clear and convincing evidence need not be accompanied by the further condition "that defendant had at such time knowledge or no-

RELEASE—CONTINUED.

tice of such fact"; since, if his lack of capacity was so great as to render him incapable of understanding the effect of the release, or if his mental incapacity did not go to that extent, the defendant had notice of his mental condition when it procured the release.
Roberts v. Pacific Telephone & Telegraph Co...... 274

REMOVAL:

Of fixtures, see **FIXTURES**, 6.

RENUNCIATION:

Of rights of holder of note, see **BILLS AND NOTES**, 7.

REOPENING CASE:

See **TRIAL**, 3, 4.

REPEAL:

Of statute providing pensions for indigent mothers, see **CONSTITUTIONAL LAW**, 2, 3.

Of statute exempting proceeds of life insurance from debts, see **EXEMPTIONS**, 2.

Implied repeal of ordinance authorizing street improvement, see **MUNICIPAL CORPORATIONS**, 9.

REPUDIATION:

Of contract by vendee, laches, see **CANCELLATION OF INSTRUMENTS**.

REQUESTS:

For instructions, harmless error in refusal of, see **APPEAL AND ERROR**, 32-34.

RESCISSION:

Cancellation of written instrument, see **CANCELLATION OF INSTRUMENTS**.

Of sale of stock for fraud, see **CORPORATIONS**, 2, 3.

RESERVATION:

Impairment of title to tide lands by attempted reservations to public use, see **NAVIGABLE WATERS**, 2.

Of lien in contract for water, see **WATERS AND WATER COURSES**, 14, 15.

RES JUDICATA:

See **JUDGMENT**.

Bar of action by former adjudication, see **ACTION**.

Conclusiveness of judgment as to taxation of costs, on contest of will, see **EXECUTORS AND ADMINISTRATORS**, 2.

RESOLUTIONS:

Of intention to make public improvement, see **MUNICIPAL CORPORATIONS**, 7, 8.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR.

RIGHT OF WAY:

For irrigation ditch, see WATERS AND WATER COURSES, 6, 7, 11.

RIPARIAN RIGHTS:

See WATERS AND WATER COURSES, 12.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 5, 6.

ROADS:

Streets in cities, see MUNICIPAL CORPORATIONS, 7-9, 21, 24-26.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 3-5, 7. .

SAFETY APPLIANCE ACT:

See MASTER AND SERVANT, 1, 9-12.

SALES:

Bill of sale as security, see CHATTEL MORTGAGES, 3.

Of corporate stock, see CORPORATIONS, 2, 3, 8, 12.

Of assets of insolvent corporation, see CORPORATIONS, 8, 11, 12.

Of goods on commission, see FACTORS.

Of unwholesome food, see FOOD.

Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2.

Bill of sale by debtor given as security, see FRAUDULENT CONVEYANCES, 1.

Of intoxicating liquors, see INTOXICATING LIQUORS.

Of logs, see LOGS AND LOGGING.

Of invention, see PATENTS.

Of realty, see VENDOR AND PURCHASER.

1. **SALES—CONDITIONAL SALES—"SIGNED"—RECORDING.** An order for the purchase of a safe, addressed to the vendor, signed by both parties, with the condition that the title shall not pass until the safe is fully paid for, recorded as a conditional sales contract, is good as between the parties. *Sunel v. Riggs*..... 314
2. **SAME—CONDITIONAL SALES—"CREDITORS"—ASSIGNEE.** Under Rem. & Bal. Code, § 3670, providing that conditional sales contracts shall be absolute as to subsequent creditors in good faith unless the contract is filed, means those creditors who have acquired some form of lien on the property; hence does not apply to an assignee for the benefit of unsecured subsequent general creditors. *Sunel v. Riggs* 314

SALES—CONTINUED.

3. SAME—CONDITIONAL SALES—BONA FIDE PURCHASER. An assignee for the benefit of creditors who was informed of a conditional sales contract, valid as between the parties, is not a *bona fide* purchaser. *Sunel v. Riggs*..... 314
4. SAME. In such case the purchaser from the assignee is not a *bona fide* purchaser, when the safe was not in the assignee's possession but had been retaken by the seller. *Sunel v. Riggs*..... 314
5. SAME—CONDITIONAL SALES—RETAKEING POSSESSION. Where a conditional sales contract is valid as between the parties, the seller, on default in payments, may retake the property at any time. *Sunel v. Riggs* 314
6. SALES—CONDITIONAL SALES—FORFEITURE — WAIVER. Where plaintiff purchased an automobile for \$1,220, paying \$1,000 in cash, taking a conditional bill of sale and giving a note for the balance, and afterwards left the car for resale with defendant, who offered to find some plan for disposing of the car so that plaintiff could get his money out of it, and plaintiff relied thereon, it is unconscionable to enforce a forfeiture, upon defendant's repairing the car at a cost of \$242, and selling it for \$1,000, without any declaration of forfeiture. *Breaks v. Spokane Auto Co.*..... 143

SELF-SERVING DECLARATIONS:

As evidence in civil actions, see EVIDENCE, 1, 5.

SEPARATE ESTATE:

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Notice of appeal, see APPEAL AND ERROR, 3, 4.

Of process, see PROCESS.

SET-OFF AND COUNTERCLAIM:

Offset of damages in action by subcontractor for materials furnished contractor, see CONTRACTS, 4, 5, 7.

Judgment as bar to counterclaim for subsequent debt, see JUDGMENT, 2.

SETTLEMENT:

Of claim for personal injuries, see RELEASE.

SHOP BOOKS:

Admissibility in evidence, see EVIDENCE, 5.

SHORE LANDS:

Conveyance by state, see NAVIGABLE WATERS.

SIDEWALKS:

Injuries from defects, see MUNICIPAL CORPORATIONS, 25, 26.

SIGNALS:

Negligence in failure to adopt system of signals or rules for operation of automatic elevator, see **MASTER AND SERVANT**, 3-5, 7.

SIGNATURES:

Of parties to conditional sales contract, see **SALES**, 1.

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As working estoppel, see **ESTOPPEL**.

SLANDER:

See **LIBEL AND SLANDER**.

SPLITTING CAUSES:

See **ACTION**.

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Of case or facts for purpose of review, see **APPEAL AND ERROR**, 9, 11.

STATES:

Assessment of state lands for local improvement, see **MUNICIPAL CORPORATIONS**, 21, 22.

Conveyance of tide and shore lands, see **NAVIGABLE WATERS**.

Title of state to locations for slips and wharves, see **NAVIGABLE WATERS**, 6.

Establishment of shore land boundary, see **NAVIGABLE WATERS**, 8.

Right to authorize appropriation of waters, see **WATERS AND WATER COURSES**, 1.

Federal grant of land to, as subject to vested rights of appropriator, see **WATERS AND WATER COURSES**, 2.

STATUTES:

See **COMMERCE**; **DESCENT AND DISTRIBUTION**; **DISCOVERY**; **ELECTION OF REMEDIES**; **ELECTIONS**; **TAXATION**, 1, 2, 4, 6; **WATERS AND WATER COURSES**, 1-3, 6, 7.

Payment of taxes to sustain adverse possession, see **ADVERSE POSSESSION**.

Agreements to arbitrate, see **ARBITRATION AND AWARD**, 1, 2.

Authorizing attachment, see **ATTACHMENT**, 1, 2.

Adjustment of excessive attorney's charges, see **ATTORNEY AND CLIENT**, 2.

Renunciation of rights of holder of note, see **BILLS AND NOTES**, 7.

Regulation of jitney busses, see **CARRIERS**, 1, 2.

Property subject to mortgage, see **CHATTEL MORTGAGES**, 1.

Validity of jitney bus act, see **CONSTITUTIONAL LAW**, 1.

Act providing pensions for indigent mothers, see **CONSTITUTIONAL LAW**, 2, 3.

Liability of agent for violation of, see **CRIMINAL LAW**, 1.

Allowance for betterments and taxes paid by defendant, see **EJECTMENT**.

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Regulating construction of electrical lines, see **ELECTRICITY**, 1.
Exemption of proceeds of life insurance, see **EXEMPTIONS**, 1, 2.
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State-wide prohibition law, see **INTOXICATING LIQUORS**.
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Publications as libel *per se*, see **LIBEL AND SLANDER**, 1.
Of limitation, see **LIMITATION OF ACTIONS**.
Federal employers' liability act, see **MASTER AND SERVANT**, 1.
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Port district act, see **MUNICIPAL CORPORATIONS**, 1.
Fireman's pension act, see **MUNICIPAL CORPORATIONS**, 4-6.
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STIPULATIONS:

Review on appeal, see **APPEAL AND ERROR**, 23.

By stockholders to turn over assets to trustee, effect, see **CORPORATIONS**, 9.

STIPULATIONS—CONTINUED.

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STOCK:

Corporate stock, see **CORPORATIONS**.

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STREET RAILROADS:

Carriage of passengers, see **CARRIERS**, 4.

STREETS:

See **MUNICIPAL CORPORATIONS**, 7-9, 21, 24-26.

Extension over tide lands, upon lowering waters by act of state, see **NAVIGABLE WATERS**, 3.

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Record on appeal, see **APPEAL AND ERROR**, 6, 7, 11.

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Rights of surety on contractor's bond, see **MUNICIPAL CORPORATIONS**, 13.

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TAXATION—CONTINUED.

1. TAXATION—RAILROAD PROPERTY—OPERATING PROPERTY—REAL ESTATE—STATUTES. Rem. 1915 Code, § 9152, providing that in the making of the assessment of the operating property of railroads, the right of way, tracks, stations and buildings used in operating the railroad shall be assessed as real estate, and the rolling stock and movable property as personal property, is to be construed in connection with Id., § 9142, defining operating property to include right of way, tracks, terminals and other real estate used in operation, and that real estate not adjoining its tracks, stations or terminals and not used in operating the railroad shall be assessed in like manner as like property of individuals; and thereunder real estate used in the operation of the railroad which adjoins its tracks, stations or terminals is to be assessed as operating property. *Northern Pac. R. Co. v. King County*..... 89
2. SAME—RAILROAD PROPERTY—"OPERATING PROPERTY"—CLASSIFICATION—PUBLIC SERVICE COMMISSION—TAX COMMISSIONERS—POWERS—STATUTES. Under the public service commission act, as amended in 1913, Rem. 1915 Code, § 8626-92, authorizing the railroad commission to classify operating and nonoperating property of railroad companies, and providing that the findings of the commission shall be conclusive, "excepting with respect to matters of assessment and taxation," and Rem. 1915 Code, § 9142, relating to the duties of the state tax commission, providing that the state tax commissioners shall make an annual assessment of the operating property of all railroad companies and defining operating property as including real estate adjoining its tracks, the railroad commission has power to classify the operating property of railroads and having classified real estate adjoining terminal grounds as operating property, the state tax commission has no authority to reclassify the same as nonoperating property because not used in operating that year, so as to authorize its assessment by the county assessor in like manner as the real estate of individuals; since the two acts are to be construed together, and the exception of the amendment of 1913 as to assessments for taxation refers only to the right of the tax commission to fix a different value upon railroad property than that fixed by the public service commission, and not to a reclassification of operating property. *Northern Pac. R. Co. v. King County*..... 89
3. TAXATION—BANKS—REALTY—DEDUCTIONS—EVIDENCE. In a proceeding by a bank to secure a deduction from its taxes of the value of certain real estate, an exhibit attached to the complaint showing certain dates preceding the description of each tract, warrants the conclusion, in the absence of any explanation, that the dates shown were the dates of the acquisition of the property. *Scandinavian American Bank of Tacoma v. Pierce County*..... 671
4. SAME—BANKS—VALUATION—REALTY—DEDUCTIONS—STATUTES. It being unlawful, under Rem. & Bal. Code, § 3330, for a bank to carry real estate on its books longer than three years, the value of such

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real estate cannot be considered and deducted from the value of its capital stock, in fixing its assessment for taxation pursuant to Rem. 1915 Code, § 9134, and a bank seeking a deduction must allege and prove the status of the realty. *Scandinavian American Bank of Tacoma v. Pierce County*..... 671

5. SAME—BANKS—REALTY—DEDUCTIONS—VALUATION. Where the assessor accepted, without explanation, the exact figure of \$229,977.28, turned in by the bank officials as the value of the bank's capital stock, surplus, and undivided profits, and the bank officials testified that such sum included \$150,000 expended on its real estate and bank building, it follows that the sum expended was taken as the value of the real property, and under Rem. 1915 Code, § 9134, sixty per cent of the amount, or \$90,000 is to be deducted as the value of the land, in determining the value of the bank's capital stock, surplus and undivided profits, for the purposes of taxation. *Scandinavian American Bank of Tacoma v. Pierce County*..... 671
6. TAXATION — EXCESSIVE ASSESSMENT—REDUCTION — PENALTY — INTEREST — STATUTES. Where a taxpayer has suffered an excessive assessment and tendered a sum which he considered fair, based upon a valuation alleged to be consistent with the valuation upon other land, and the tax is set aside and reduced as fraudulently excessive, the amount found due by the court does not draw interest at the rate of fifteen per cent per annum, under Rem. 1915 Code, § 9219, providing that delinquent taxes shall draw interest at fifteen per cent per annum from the date of delinquency; in the absence of any provision in the statute for the payment of interest or the remission of interest where a tax is questioned, either in whole or in part. *State ex rel. First Thought Gold Mines v. Superior Court*..... 433
7. SAME. Interest on delinquent taxes is a penalty, and a penalty that is illegal in part is wholly void. *State ex rel. First Thought Gold Mines v. Superior Court*..... 433
8. SAME. A judgment of the supreme court directing a judgment in a reduced sum for a fraudulently excessive tax does not provide for the fifteen per cent penalty which attaches to delinquent taxes only by force of statute. *State ex rel. First Thought Gold Mines v. Superior Court* 433
9. TAXATION—TAX DEED—ACTIONS TO SET ASIDE—LIMITATION. An action to quiet title to land sold for taxes on the ground that the tax judgment was void for want of valid process, is governed by Rem. 1915 Code, § 162, limiting actions to cancel a tax deed or recover lands sold for taxes to three years from the date of the issuance of the tax deed. *Keller v. Davis*..... 336

TAX COMMISSION:

Authority to reclassify property of railroad for taxation, see TAXATION, 2.

TAXES:

See **TAXATION**.

Right to counterclaim for taxes paid, see **EJECTMENT**.

TENDER:

Parol evidence of waiver of legal tender, see **EVIDENCE**, 10.

Of deed in action to enforce water lien, see **WATERS AND WATER COURSES**, 15.

1. **TENDER — WAIVER — EVIDENCE — SUFFICIENCY.** A waiver of legal tender of the contract price for wheat is sufficiently shown by failure to reply to a letter that the buyer would pay by his check, taken in connection with other circumstances. *Wallace v. Babcock*..... 392

TERM:

Of trustees of corporation, see **CORPORATIONS**, 5, 6.

Of appointee to vacancy in office of superior judge, see **JUDGES**, 1.

TIDE LANDS:

Conveyance of state tide lands, see **NAVIGABLE WATERS**.

TIME:

Duration of term of trustees, see **CORPORATIONS**, 5, 6.

For filing contest of nomination, see **ELECTIONS**, 2.

For filing claim for exemptions, see **EXEMPTIONS**, 3.

For filing claim against contractor's bond, see **MUNICIPAL CORPORATIONS**, 12.

For immunity of nonresident from service of process, see **PROCESS**.

TITLE:

Color of title, see **ADVERSE POSSESSION**.

Of trustee to assets, see **BANKRUPTCY**, 1.

Of heirs, see **DESCENT AND DISTRIBUTION**.

Of grantee to tide and shore lands, see **NAVIGABLE WATERS**, 1, 2.

Of state to designated sites for slips and wharves on plat of harbor area, see **NAVIGABLE WATERS**, 6.

Statutes, see **STATUTES**, 1.

TOLLING:

Statute of limitations, see **LIMITATION OF ACTIONS**, 1, 2.

TORTS:

See **CONSPIRACY; FRAUD; LIBEL AND SLANDER; NEGLIGENCE**.

Measure of damages, see **DAMAGES**, 1, 2.

Causing death, see **DEATH**.

Sale of unwholesome food, see **FOOD**.

Accrual of action for, see **LIMITATION OF ACTIONS**.

Of employers, see **MASTER AND SERVANT**.

Of city, see **MUNICIPAL CORPORATIONS**, 25-30.

TRADE FIXTURES:

See **FIXTURES**.

TRANSCRIPTS:

Of record for purpose of review, see **APPEAL AND ERROR**, 5-11.

TRAPDOORS:

Negligence in maintenance of in sidewalk, see **MUNICIPAL CORPORATIONS**, 27.

TRESPASS:

Accrual of action for, see **LIMITATION OF ACTIONS**, 4.

TRESPASSERS:

Injury to, see **NEGLIGENCE**.

TRIAL:

See **NEW TRIAL**.

Exceptions or objections for purpose of review, see **APPEAL AND ERROR**, 1, 2.

Review of errors as dependent on presentation of same by record, see **APPEAL AND ERROR**, 5-11.

Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR**, 27-34.

Instructions in action for injury to passenger on street car, see **CARRIERS**, 4.

Of criminal prosecution, see **CRIMINAL LAW**. ..

Instructions in action for injury causing temporary insanity, see **DAMAGES**, 3, 4, 6.

Right to trial by jury, see **JURY**.

Instructions as to burden of proof to show sanity of plaintiff, see **LIMITATION OF ACTIONS**, 2.

Instructions in action for injury from defective sidewalk, see **MUNICIPAL CORPORATIONS**, 26.

Amendments at trial, see **PLEADING**, 2.

Instructions as to avoidance of release through insanity of plaintiff, see **RELEASE**, 5.

1. **TRIAL—RECEPTION OF EVIDENCE—OFFER OF PROOF.** It is not error to refuse to exclude the jury while appellant was making an offer of proof, upon a favorable fact, even though followed by an admonition to disregard it. *MacDermid v. Seattle*..... 167
2. **TRIAL—RECEPTION OF EVIDENCE—OFFER OF PROOF.** A general offer of further evidence upon a point, without offer of any specific evidence or statement as to what a witness would testify to or that it was not merely corroborative, is insufficient to predicate error on its rejection. *Godefroy v. Hupp*..... 371

TRIAL—CONTINUED.

3. TRIAL—CONDUCT—REOPENING—DISCRETION. It is discretionary for the trial court to reopen a case for the taking of further evidence. *Godefroy v. Hupp*..... 371
4. TRIAL—CONDUCT—REOPENING—DISCRETION. It is discretionary to reopen a case, during the progress of the argument, for the taking of further testimony. *Dunlap v. Seattle National Bank*..... 568
5. TRIAL—EVIDENCE—FOREIGN LAWS—PROVINCE OF COURT AND JURY. When a rule of law in a sister state merely involves the interpretation of judicial opinions, it becomes a question of law for the court and not of fact for the jury. *Bogitch v. Potlatch Lumber Co.* 585
6. TRIAL—PROVINCE OF COURT AND JURY—CONTRACTS. Whether a contract is divisible is a question of law dependent upon the terms of the contract; and what the terms are is a question of fact dependent upon the evidence. *Godefroy v. Hupp*..... 371
7. SAME—QUESTIONS OF FACT—NONSUIT—JUDGMENT. Upon challenge to the sufficiency of the evidence, a nonsuit or judgment *non obstante* can be granted only when there is neither evidence nor reasonable inference from the evidence to sustain a verdict. *Godefroy v. Hupp* 371
8. TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS. In an action for personal injuries sustained by stepping on a loose plank in a sidewalk, an instruction "if you think the plaintiff was negligent herself," etc. is not an assumption by the court, but a submission of the fact to the jury. *MacDermid v. Seattle*..... 167
9. SAME—STREETS—ACTIONS—DEGREE OF CARE—INSTRUCTIONS. In such an action, an instruction that remote localities in a suburb do not require the same degree of care as where travel is frequent is not prejudicial, when taken in connection with proper instructions as to the care imposed by law in maintaining streets in proportion to the danger to be apprehended in view of the circumstances and surroundings. *MacDermid v. Seattle*..... 167
10. TRIAL—INSTRUCTIONS—RECITALS OF EVIDENCE. It is not error, in giving the legal principles submitted in a requested instruction, to omit the recitals of evidence prefacing the same. *State v. Hankins* 124
11. TRIAL—FINDINGS OF FACT—NECESSITY—EQUITABLE ACTIONS. Where, in eminent domain proceedings to acquire property for a street, on objections to the assessment roll raising the issue that the property already belonged to the city, it was stipulated that the court should determine that question, the action became in effect an equitable action to quiet title in the city; and therefore findings of fact were not essential to sustain a judgment in favor of the city. *Olympia v. Lemon*..... 508

TRIAL—CONTINUED.

12. **TRIAL—FINDINGS OF FACT—NECESSITY.** Findings of fact are not essential in an equitable case. *Dunlap v. Seattle National Bank* 568

TRUSTEES:

- In bankruptcy, see **BANKRUPTCY**, 1-6, 8, 9.
 Of corporation, see **CORPORATIONS**, 5-7, 9, 10.

TRUSTS:

- Trustees in bankruptcy, see **BANKRUPTCY**, 1-6, 8, 9.
 Administration of assets of corporation by trustee, see **CORPORATIONS**, 9, 10.

1. **TRUSTS—IMPLIED TRUSTS—EXISTENCE—DEPOSIT IN BANK—KNOWLEDGE OF DEBT.** A bank, collecting the proceeds of logs sold by a logger, under his direction, would not be a trustee to the extent of the stumpage due, by reason of knowledge that the stumpage was to be paid upon the sale of the logs, where the stumpage contract did not create any lien on the logs or any right to the first proceeds, but only the relation of debtor and creditor. *Vance Lumber Co. v. United States Trust Co.*..... 563
2. **TRUSTS—COMMINGLED FUNDS—DISSIPATION BY WITHDRAWALS—RIGHTS OF BENEFICIARY.** Where a trustee blended the trust funds by depositing it in bank with his own, and checked against it indiscriminately, withdrawals leaving a balance of less than the trust fund are a dissipation of the fund, except as to the balance, and the *cestui que trust*, garnisheeing the bank, is limited to the recovery of the lowest balance to which the blended account was reduced at any time. *Chase & Baker Co. v. Olmsted*..... 306
3. **SAME—COMMINGLED FUNDS—DISSIPATION—RIGHTS OF BENEFICIARY—GARNISHMENT—BURDEN OF PROOF.** A *cestui que trust*, garnisheeing a bank on the blended account of the trustee which the trustee had reduced by withdrawals, has the burden to show the amount of the lowest balance of the blended account which fixes the amount of the recovery. *Chase & Baker Co. v. Olmsted*..... 306
4. **TRUSTS—COMMINGLED FUNDS—WITHDRAWALS—MUNICIPAL CORPORATIONS—IMPROVEMENT FUND—LIABILITY.** Where a city commingled a local improvement trust fund with its general funds deposited in a bank, and there remained continuously on deposit sufficient to meet warrants against the trust fund, the warrants are payable out of the commingled fund. *State ex rel. Titlow v. Centralia*..... 401

UNLAWFUL DETAINER:

- See **LANDLORD AND TENANT**.

VACANCY:

- In office of superior judge, term of appointee, see **JUDGES**, 1.

VACATION:

See **ATTACHMENT**, 4.

Award, see **ARBITRATION AND AWARD**.

Of tax deed, see **TAXATION**, 9.

VALUATION:

Of real property in determining value of bank's capital stock and profits, for purpose of taxation, see **TAXATION**, 4, 5.

VARIANCE:

In action to foreclose lien, see **MECHANICS' LIENS**, 2.

VENDOR AND PURCHASER:

Sale of mineral claims, see **MINES AND MINERALS**, 1-3.

Purchasers of mortgaged property, see **MORTGAGES**.

Purchasers of state tide and shore lands, see **NAVIGABLE WATERS**.

Transfer of ownership of personal property, see **SALES**.

1. **VENDOR AND PURCHASER—CONTRACTS—ASSUMPTION OF MORTGAGE—PAYMENT OF PURCHASE PRICE.** Where, upon the sale of lots, the price was fixed at \$20,000, and was to be paid by the assumption of local improvement liens, the assumption of mortgages, the conveyance of a lot, and the balance in cash, without any agreement to pay the \$20,000 in any event, and there was nothing to indicate that the vendee, in meeting the incumbrances, was acting as agent of his vendor, the vendor cannot recover of the vendee a portion of the mortgage indebtedness which the vendee was not required to pay. *Tetzner v. Wulf*..... 160

VERDICT:

Waiver of error on appeal, see **APPEAL AND ERROR**, 15.

Motion to direct verdict of acquittal, see **CRIMINAL LAW**, 2.

Inadequate or excessive damages, see **DAMAGES**, 1, 2; **DEATH**, 2.

VESTED RIGHTS:

To relief under fireman's pension act, see **MUNICIPAL CORPORATIONS**, 6.

To waters for irrigation, see **WATERS AND WATER COURSES**, 2.

VICE PRINCIPALS:

See **MASTER AND SERVANT**, 1.

WAIVER:

See **ESTOPPEL**.

Of objection to splitting of causes of action, see **ACTION**.

Error waived in appellate court, see **APPEAL AND ERROR**, 1, 2, 14-16.

Of objections to submission to arbitration, see **ARBITRATION AND AWARD**, 3.

Lien of attorney, see **ATTORNEY AND CLIENT**, 1.

WAIVER—CONTINUED.

- Of objections to allowance of fees to trustee, see **BANKRUPTCY**, 9.
- Of compensation before taking, remedy of owner, see **EMINENT DOMAIN**, 3.
- Parol evidence of waiver of legal tender, see **EVIDENCE**, 10.
- Claim for exemptions, see **EXEMPTIONS**, 3.
- Of forfeiture under conditional sales contract, see **SALES**, 6.
- By stipulation, see **STIPULATIONS**.
- Of legal tender, see **TENDER**.

WARNING:

- To servant of dangers, see **MASTER AND SERVANT**, 6.

WARRANTS:

- Mandamus to compel city to pay warrants, see **MANDAMUS**, 1; **MUNICIPAL CORPORATIONS**, 31.
- Payment of local improvement warrants on commingling of city funds, see **TRUSTS**, 4.

WARRANTY:

- Parol evidence to show contemporaneous warranty as varying written lease, see **EVIDENCE**, 8.
- Implied warranty on sale of food, see **FOOD**.

WATERS AND WATER COURSES:

See **NAVIGABLE WATERS**.

Right of administrator to sue to quiet title to water for irrigating lands of estate, see **EXECUTORS AND ADMINISTRATORS**, 1.

Damage to goods from break in water main, see **MUNICIPAL CORPORATIONS**, 28-30.

1. **WATERS AND WATER COURSES—APPROPRIATION—RIGHTS—POWER OF STATE.** The United States government having by acts of Congress waived its right to waters flowing within the boundaries of any state, the state had a right in 1899, by Rem. 1915 Code, § 6333, to authorize the appropriation of waters for irrigation purposes, as an impairment, by reason of necessity, of the common law right to the undiminished flow of a stream in its natural channel. *Colburn v. Winchell* 388
2. **SAME—PUBLIC LANDS—VESTED RIGHTS—SUBSEQUENT GRANT TO STATE.** An appropriation of water for irrigation having been made in 1903, under the authority of the act of 1890 while the title to the lands was in the Federal government, the state, in subsequently taking title for the purposes of a scientific school, takes the same subject to the previous vested right. *Colburn v. Winchell*..... 388
3. **SAME—APPROPRIATION—PUBLIC LANDS—EVIDENCE—SUFFICIENCY.** That land within the public domain was vacant, unimproved and unoccupied, at the time of the appropriation of water from a stream,

WATERS AND WATER COURSES—CONTINUED.

- is some evidence that it was unappropriated government land, within 7 Fed. Stat. Ann. 1091, confirming the title to the water upon public lands actually appropriated and put to a beneficial use; and is sufficient where there was no controverting evidence or inference. *Wendler v. Woodard*..... 684
4. SAME—APPROPRIATION—REQUISITES. In appropriating water for irrigation, there must be an intention to appropriate a certain quantity, and the actual use thereof or the exercise of reasonable diligence in preparing the land therefor. *Colburn v. Winchell*..... 388
 5. SAME—NOTICE OF APPROPRIATION—SUFFICIENCY. A notice of appropriation of water for irrigation will not be held defective, where no specific failure to comply with the law is pointed out, though evidence of the notice of posting may be meager. *Colburn v. Winchell* 388
 6. SAME—APPROPRIATION—RIGHT OF WAY—STATUTES. The act of 1907, Rem. 1915 Code, § 6844, respecting the right to construct ditches over the land of the state in aid of irrigation has no application to a ditch already constructed for waters appropriated before the passage of the act. *Colburn v. Winchell*..... 388
 7. SAME. Where an irrigation ditch for appropriated water was constructed across lands before the title passed out of the Federal government, a right of way therefor was acquired under Federal Statutes Annotated, vol. 7, p. 1090. *Colburn v. Winchell*..... 388
 8. WATERS AND WATER COURSES—APPROPRIATION—IRRIGATION—RIGHTS OF SETTLERS—BENEFICIAL USE. The prior appropriators of the waters of a creek, who settled upon government land and later acquired title, and their successors in interest, are entitled to use all the waters which they had, within a reasonable time, devoted to a beneficial use in irrigating their lands. *Edendale Land Co. v. Morgan* 554
 9. SAME—PRESCRIPTIVE RIGHTS—QUANTITY OF WATER. A prescriptive right cannot be claimed to more than one-half of the waters of a creek, where the ditch through which it was diverted, as first constructed in 1896, did not carry more than one-half of the water, and was not enlarged until 1904, and the action was commenced in 1912 to enjoin the increased diversion. *Edendale Land Co. v. Morgan* 554
 10. SAME—IRRIGATION—PRESCRIPTIVE RIGHTS—ABANDONMENT. Whether an irrigation ditch was abandoned by changes made with permission is a question of fact and intention. *Wendler v. Woodard*..... 684
 11. SAME—PRESCRIPTIVE RIGHTS—RIGHT OF WAY—ADVERSE USE—CLAIM OF RIGHT—PRESUMPTION. Continuous, actual and open possession of water flowing in a ditch across railroad lands, for the requisite statutory period, is presumed to be under a claim of right,

WATERS AND WATER COURSES—CONTINUED.

- so as to ripen into title to the right of way by prescription, although there may have been immaterial changes in the use of the easement. *Wendler v. Woodard*..... 684
12. WATERS AND WATER COURSES—RIPARIAN RIGHTS—APPROPRIATION—PRESCRIPTIVE RIGHTS. Upon a controversy as to the riparian right to the waters of a creek for irrigation, under a deed as to which there was room for a difference of opinion as to the amount of water granted, a continued mutual diversion by both parties for a period of twenty years of a certain proportion of the water becomes determinative of their rights, although there may have been no express agreement to that effect. *Villa v. Keylor*..... 164
13. SAME—APPROPRIATION—WRONGFUL DIVERSION—DAMAGES—EVIDENCE—SUFFICIENCY. In an action for the diversion of the waters of a creek, evidence of damages based on the assumption that the plaintiffs were entitled to all the waters, does not show the extent of the damages from a wrongful diversion of one-half of the waters. *Edendale Land Co. v. Morgan*..... 554
14. WATERS AND WATER COURSES—IRRIGATION—CONTRACTS—RESERVATION OF LIEN—FORECLOSURE. A contract by an irrigation company to furnish water may, irrespective of statutory authorization, create a lien in the nature of a mortgage upon the water right granted to secure all sums that may be due under the contract; and, upon any default, the same is enforceable in an action in equity to foreclose the mortgage or discharge the lien by sale of the land and water right. *Fruitland Irrigation Co. v. Thayer*..... 338
15. SAME—IRRIGATION—CONTRACT—ACTIONS—ENFORCEMENT OF LIEN—TENDER OF DEED. In such an action, it is unnecessary that the company tender a water deed before action, where it is alleged that it would be vain, the grantee was in default, and the foreclosure decree and sale protected the grantees, allowing them a year for redemption. *Fruitland Irrigation Co. v. Thayer*..... 338
16. WATERS AND WATER COURSES—IRRIGATION—LEASED LANDS—ACTIONS—LANDLORD AND TENANT. In an action to enjoin interference with water rights for irrigation, it is immaterial that the lands were under lease, since either the owner or tenant could enjoin interference with possessory rights. *Wendler v. Woodard*..... 684
17. SAME—ACTIONS—DECREE—EQUITY. Where plaintiff, in his pleadings, only claimed 200 cubic inches of water per second of time, out of a flow of 1,500 cubic inches flowing in a ditch, defendant, under a denial of the right to the water and easement, brings himself within the domain of equity; and it is inequitable and error to enjoin any interference with the water in the ditch, thereby preventing the beneficial use of water not belonging to the plaintiff;

WATERS AND WATER COURSES—CONTINUED.

but the decree should specifically establish the plaintiff's right to 200 inches and to the easement in the ditch to that extent. *Wendier v. Woodard*..... 684

WHARVES:

In harbor area, see **NAVIGABLE WATERS**, 6.

WILLS:

Contest, conclusiveness of judgment as to costs, see **EXECUTORS AND ADMINISTRATORS**, 2.

WINDING UP:

Of corporate business, see **CORPORATIONS**, 9-11.

WITHDRAWAL:

Of commingled funds by trustee, see **TRUSTS**, 2-4.

WITNESSES:

Experts, see **EVIDENCE**, 11, 12.

Expert evidence as to cause of accident, see **MASTER AND SERVANT**, 13.

1. **WITNESSES—COMPETENCY—“TRANSACTION WITH PERSON SINCE DECEASED.”** In an action by executors for money collected by defendant for the deceased, the defendant's identification of deceased's signature to receipts for money paid by defendants is not within Rem. 1915 Code, § 1211, excluding the testimony of a party in interest in his own behalf as “to any transaction had by him” with the deceased. *Goldsworthy v. Oliver*..... 67
2. **SAME.** In such a case, the testimony of the defendant as to the existence and loss of a receipt signed by the deceased which was not produced is inadmissible as being testimony of “a transaction had with the deceased,” under the statute. *Goldsworthy v. Oliver*... 67
3. **WITNESSES—COMPETENCY—TRANSACTION WITH PERSONS SINCE DECEASED.** In an action to quiet title against two defendants, man and wife, claiming distinct properties through separate deeds of gift, as separate property, each of the defendants is entitled to testify on behalf of the other as to transactions had with the deceased, although disqualified in his or her own behalf, by Rem. 1915 Code, § 1211. *Showalter v. Spangle*..... 326
4. **SAME.** In such case, the interest of each spouse in the other's separate property is prospective only, and does not disqualify. *Showalter v. Spangle*..... 326
5. **WITNESSES—CREDIBILITY—CONVICTION OF CRIME.** In a civil action for an assault and battery, the record of defendant's conviction in the police court for the commission of the same assault and battery

WITNESSES—CONTINUED.

is admissible when offered for the sole purpose of affecting the weight to be given to the testimony of the defendant as expressly provided in Rem. 1915 Code, § 2290. *Marshall v. Dunn*..... 156

6. **WITNESSES—CREDIBILITY—CONVICTION—"CRIME"—STATUTES.** An assault and battery, even if made punishable by a municipal ordinance as a misdemeanor, being *malum in se*, is a "crime," within Rem. 1915 Code, § 2290, permitting a conviction of crime to be shown for the purpose of affecting the weight to be given to the defendant's testimony. *Marshall v. Dunn*..... 156

WORK AND LABOR:

Liens for work and materials, see **MECHANICS' LIENS**.

WORKERS:

Who are, as within meaning of employment agency law, see **STATUTES**, 2, 3.

WRITINGS:

Parol evidence to vary writings, see **EVIDENCE**, 6-10.

WRITS:

See **ATTACHMENT; MANDAMUS; PROCESS**.

Ex. 1.1.1.





